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SC
7848

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 143.

AMERICAN SMELTING AND REFINING COMPANY, PLAINTIFF IN ERROR,

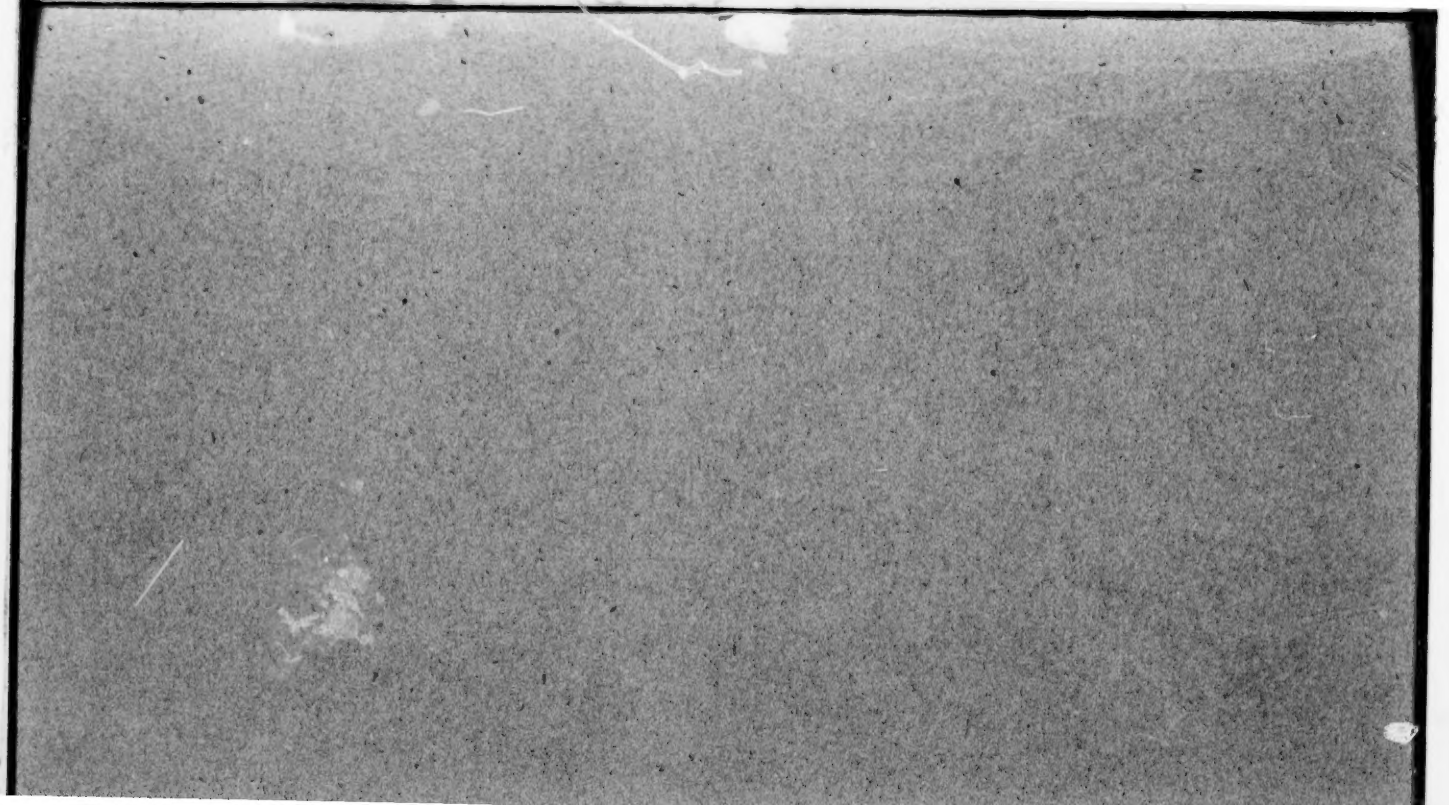
vs.

THE PEOPLE OF THE STATE OF COLORADO ON THE RELATION OF HENRY A. LINDSLEY, DISTRICT ATTORNEY FOR THE SECOND JUDICIAL DISTRICT OF THE STATE OF COLORADO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

FILED NOVEMBER 3, 1905.

(19,951.)



(19,951.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 449.

AMERICAN SMELTING AND REFINING COMPANY, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF COLORADO ON THE RELATION OF HENRY A. LINDSLEY, DISTRICT ATTORNEY FOR THE SECOND JUDICIAL DISTRICT OF THE STATE OF COLORADO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 17, 1906.

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In the Supreme Court of the State of Colorado.

leas before the Honorable the Supreme Court of the State of Colorado, sitting at Denver in said State, at a term thereof begun and Held at the Capitol Building in said city on the second Monday of April, A. D. 1905, and of the Independence of the United States the one hundred and twenty-ninth.

Present: Hon. William H. Gabbert, Chief Justice; Hon. Robert . Steele, Hon. John Campbell, Hon. Julius C. Gunter, Hon. Luther . Goddard, Hon. John M. Maxwell, Hon. George W. Bailey, Associate Justices; N. C. Miller, Esq., Attorney General; Richard W. atson, Esq., Bailiff; Horace G. Clark, Esq., Clerk.

Be it remembered that heretofore, and on to-wit, the 2d day of arch, A. D. 1904, there was filed in the office of said Clerk the following transcript of record, bill of exceptions and assignment of errs, which are in words and figures as follows, to-wit:

Pleas in the District Court of the Second Judicial District of the State of Colorado, sitting in and for the City and County of Denver.

Be it remembered, that heretofore, and on, to-wit, the 10th day of ebruary, A. D. 1903, came the plaintiff by its attorney Henry A. indsley, Esq., and filed herein its complaint;
And said complaint is in words and figures as follows, to-wit:

TATE OF COLORADO,
County and City of Denver, formerly a part of the County of Arapahoe.

In the District Court.

HE PEOPLE OF THE STATE OF COLORADO on the Relation of HENRY A. LINDSLEY, District Attorney for the Second Judicial District of the State of Colorado, Plaintiff,
vs.
MERICAN SMELTING AND REFINING COMPANY, a Corporation, Respondent.

Complaint and Information for Writ of Quo Warranto.

Now come the people of the State of Colorado on the relation of Henry A. Lindsley, the district attorney for the Second Judicial District of the said State of Colorado, of his own accord, nd respectfully represents, informs and shows to the court:
1. That relator is the duly elected, qualified and acting district attorney for the Second Judicial District of the State of Colorado;

2. That respondent, the "American Smelting and Refining Co
pany" filed a duly executed certificate, or articles of incorporati
with and in the office of the Secretary of State of New Jersey, on,
wit: the 4th day of April, A. D. 1899, and a duly executed certific
or articles of incorporation with and in the office of the clerk of Hu
son county, in the State of New Jersey, where the principal office
said Company in the State of New Jersey was, by said certificate
articles of incorporation, established on the same day, to-wit, the 4
day of April, A. D. 1899, and thereby, on said day, became a bo
corporate under and by virtue of the laws of the State of New Jer
by the name aforesaid, and is therefore a foreign corporation.

3. That thereafter, and on, to-wit, the 28th day of April, A.
1899, the said respondent, the "American Smelting and Refini
Company" filed with and in the office of the Secretary of State of t
State of Colorado, a certificate signed by its president and s
3 retary, duly acknowledged, designating the City of Denver,
the State of Colorado, as the principal place within the State
Colorado where the business of the said corporation should be carri
on, and also designating and appointing James B. Grant, of the C
of Denver and State of Colorado, as the authorized agent of sa
company, upon whom process may be served; and the said certific
was signed, sealed and acknowledged by the president and secreta
of the said company on, to-wit, the 25th day of April, A. D. 18
and that on said 28th day of April, A. D. 1899, said respondent a
filed with and in the office of the Secretary of State of the said St
of Colorado, a copy of its charter or certificate of incorporation, du
certified and authenticated by the Secretary of State of the said St
of New Jersey, and also a copy — the general corporation law und
which said respondent was incorporated in said State of New Jers
duly certified and authenticated by the Secretary of State of the sa
State of New Jersey, and thereby, on said day, said respondent b
came, and was, authorized, or permitted to do business in the sa
State of Colorado, as such corporation, under and by virtue of t
laws of the said State of Colorado;

4. That by said certificate or articles of incorporation the amou
of the capital stock of the said company was fixed at sixty-fi
4 million dollars ($65,000,000) divided into shares of the p
value of one hundred dollars ($100) each and that thereaf
and on, to-wit, the 8th day of April, A. D. 1901, the said responde
filed in the office of the Secretary of State of the State of New Jers
a duly executed amendment to its said certificate or articles of inc
poration, theretofore filed as aforesaid, and that by said amendme
to said certificate or articles of incorporation the amount of the ca
ital stock of the said company was increased to and fixed at one hu
dred million dolars ($100,000,000) and divided into shares of t
par value of one hundred dollars ($100) each and the amount of t
capital stock of the said company is still fixed at and is one hundr
million dollars ($100,000,000); and that thereafter and on, to-w
the 17th day of May, A. D. 1901, the said respondent filed with a
in the office of the Secretary of State of the said State of Colorado,
copy of the said amendment to its certificate or articles of incorpo

tion, duly certified and authenticated by the Secretary of the said State of New Jersey.

5. That by said certificate or articles of incorporation, said respondent was and is permitted to do business outside and beyond the limits of the said State of New Jersey, and by said certificate, signed, sealed and acknowledged by the president and secretary of
5 said respondent corporation, on, to-wit: the 25th day of April, A. D. 1899, and filed in the office of the Secretary of State of the State of Colorado, on, to-wit: the 28th day of April, A. D. 1899, the principal office and place of business of said respondent corporation within the State of Colorado, is fixed and located, and still is, in the City of Denver, in the State of Colorado.

6. That by said certificate or articles of incorporation, said respondent was and is authorized and empowered, among other things, to carry on a general ore reduction, milling, sampling, smelting and mining business, and does not come and is not within any of the classes of corporations excepted or exempted from liability for, or the payment of, the annual State corporation license tax hereinafter referred to.

7. That from the time of the filing, on, to-wit: the 28th day of April, 1899, of the said certificate by the president and secretary of the said respondent corporation, dated the 25th day of April, A. D. 1899, and the filing on, to-wit: the 28th day of April, A. D. 1899, of the said copy of its charter or certificate of incorporation, and of the duly certified and authenticated copy of the general corporation law of the said State of New Jersey, under which it was incorporated, the said corporation has been, and still is, doing business as
6 such corporation in the said State of Colorado.

8. That under and by virtue of the provisions of an Act entitled "An Act in relation to public revenue and repealing all previous acts, or parts of acts, in conflict therewith," approved March 22, A. D. 1902, it is provided among other things, that in addition to all other fees and taxes provided for by law, every foreign corporation except those chartered strictly for educational, social, literary, scientific, religious or charitable purposes or ditch or irrigation corporations, whose property is exempt by law from taxation, or those incorporated as Masonic lodges, Odd Fellows' lodges, or other fraternal or benevolent societies, incorporated under the laws of the State of Colorado, and those whose shares of capital stock are less than one dollar ($1.00) per share par value, shall pay on or before the first day of May of each year, an annual State corporation license tax to the Auditor of the State of Colorado, as follows: Four (4) cents upon each one thousand dollars ($1,000) of its capital stock, and that every foreign corporation which shall fail to pay such tax shall, by reason of such failure, forfeit its right to do business within the limits of this State, until such tax is paid.

9. That under and by virtue of the provisions of said Act,
7 there was due from said respondent and payable to the Auditor of the State of Colorado, on or before the first day of May, A. D. 1902, an annual State corporation license tax of four thousand dollars ($4,000), which, though notified by the Auditor of State of

the time of payment of such tax, as required by said Act, the said respondent wholly failed, neglected and refused to pay.

10. That thereafter, and on, to-wit: the 29th day of May A. D. 1902, the Auditor of State of the State of Colorado, within the time required by the said Act, notified, in writing, the said respondent that by failure to comply with the requirements of said Act, it had forfeited its charter or right to do business within the State of Colorado, and further advised said respondent how it could be relieved from said forfeiture, but, notwithstanding such notice, and the requirements of said Act, the said respondent has never paid said tax, and still neglects or refuses to pay the same, or any part thereof.

11. That by the provisions of the Act aforesaid, and the failure of the respondent to pay the said annual State corporation license tax aforesaid, the said respondent has forfeited its right to do business within the limits of the State of Colorado, and that since the first day of May, A. D. 1902, and for more than nine months last past, said respondent has exercised, and still continues to exercise,
8 the powers, privileges and franchises of a corporation within the limits of the State of Colorado, without warrant of law, and therefore has usurped and still usurps the same.

Wherefore, relator prays due process of law in this behalf, to make the respondent answer to the people of the State of Colorado by what warrant it claims to have, use and enjoy the powers, privileges and franchises aforesaid, and the right to do business as such corporation within the limits of the said State and why the said franchise and charter should not be adjudged forfeit- and the respondent ousted of the same, and for judgment against said respondent for costs and for such other and further relief or judgment as to the court may seem right and proper.

HENRY A. LINDSLEY,
District Attorney for the Second Judicial District and Judicial District Constituted by City and County of Denver.

N. C. MILLER,
Attorney-General.
HENRY J. HERSEY AND
I. B. MELVILLE,
Of Counsel.

(Endorsed:) No. 35293. In the District court. The People of the State of Colorado, Plaintiff, *vs.* American Smelting & Re-
9 fining Company, a corporation, Respondent. Complaint and information for Writ of Quo Warranto. Henry A. Lindsley, District Attorney; N. C. Miller, Attorney General. Henry J. Hersey, L. B. Melville, Of Counsel. Filed in District court, Arapahoe county, Colo., Feb. 10, 1903, Otis B. Spencer, Clerk.

And afterwards, and on, to-wit, the 3rd day of March, A. D. 1903, came the defendant by its attorneys, Messrs. Wolcott, Vaile & Waterman, and filed herein its Demurrer;

And said Demurrer is in words and figures as follows, to-wit:

STATE OF COLORADO, *City and County of Denver, ss:*

In the District Court.

THE PEOPLE OF THE STATE OF COLORADO on the Relation of HENRY A. LINDSLEY, District Attorney for the Second Judicial District of the State of Colorado, Plaintiff,

vs.

THE AMERICAN SMELTING AND REFINING COMPANY, a Corporation, Respondent.

Demurrer of the Respondent to the Complaint and Information for a Writ of Quo Warranto.

The defendant in the above entitled cause demurs to the
10 complaint and information therein, upon the following grounds:

I.

That said complaint and information does not state facts sufficient to constitute a cause of action against this defendant.

II.

That said complaint and information does not state facts sufficient to constitute a cause of action against this defendant as to each and all of the following particulars hereinafter set forth, to-wit:

1. That the Act entitled: "An Act in relation to public revenue, and repealing all previous Acts or parts of Acts in conflict therewith," approved March 22, 1902, in so far is it purports to provide by Section 66 thereof, for a forfeiture of the right of a corporation to do business within the State of Colorado, attempts to cover a subject not relating to public revenue, and a subject different from any other subject contained in said Act, and the same is not expressed in the title thereof, and the said Act as to the provisions of said Section 66 is in violation of Section 21 of Article V of the Constitution of the State of Colorado.

2. That the said Act entitled: "An Act in relation to
11 public revenue, and repealing all previous Acts or parts of Acts in conflict therewith," approved March 22, 1902, is in violation of Section 3 of Article X of the Constitution of the State of Colorado.

3. That it appears by the allegations of the complaint and information herein that prior to the time of the passage and approval of the said Act of March 22, 1902, this defendant had lawfully obtained and was then lawfully exercising the right and privilege to transact and carry on business within the limits of the State of Colorado; that the said Act of March 22, 1902, by Section 64 thereof, exempts domestic corporations having a capital stock of less than

$25,000 from the "annual State corporation license tax," by said Act provided; that every domestic corporation having a capital stock of $25,000 or over is by said Act required to pay two cents on each $1,000 of its capital stock, as such annual State tax, and by Section 65 of said Act it is provided that every foreign corporation which had theretofore obtained the right and privilege to transact and carry on business within the limits of the State of Colorado should pay four cents on each $1,000 of its capital stock as such annual tax. And this defendant represents unto the court that the *the* taxes provided for by said Act are not uniform upon the same class of subjects within the limits of the authority levying the said tax,
12 and that said Act does not prescribe such regulations as shall secure a just valuation of all property real and personal, and that said Act of March 22, 1902, as to the provisions of Sections 64, 65 and 66 thereof, is in violation of Section 3 of Article X of the Constitution of the State of Colorado.

4. That said act of March 22, 1902, in so far as it purports to provide by Section 66 thereof for a forfeiture of the right of a corporation to do business within the limits of the State of Colorado, attempts to deprive persons of property without due process of law and is in violation of Section 25, of Article II of the Constitution of the State of Colorado.

5. That said Act of March 22, 1902, impairs the obligation of contracts, and is in violation of Section 11 of Article II of the Constitution of the State of Colorado.

6. That it appears by the allegations of the Complaint and Information that prior to the passage and approval of the said Act of March 22, 1902, and on, to-wit, the 28th day of April, 1899, this defendant having then an authorized capital stock of $65,000,000, complied with the then existing laws of the State of Colorado and filed a certified copy of the laws of the State of New Jersey, under which it was organized, and certified copy of its Articles of Incorporation, and certificate of appointment of agent, with the
13 Secretary of State of the State of Colorado, which it could do only upon the payment of the sum of $9,792.50, under the provisions of an Act entitled "An Act concerning corporations," approved April 13, 1897; and it further appears by said complaint and information that thereupon this defendant became and was authorized to do business in the State of Colorado; that it further appears from the allegations of said complaint and information that on or about the 17th day of May, 1901, and before the passage or approval of the said Act of March 22, 1902, this defendant filed with the Secretary of State of the State of Colorado its certificate of increase of its capital stock, fixing the aggregate capital thereof, at $100,000,000, which filing could only be made upon the payment of the further sum of $5,250. And this defendant represents unto the court that by the payment of the said sums, aggregating $15,042.50, and by compliance with the laws of the State of Colorado then existing, this defendant acquired the contract right to carry on its business in the State of Colorado, and is entitled to the protection of Section 11 of Article II of the Constitution of the State of Colorado

against any attempt to declare a forfeiture of its said right so to do business in said State, and that the said Act of March 22, 1902, in so far as it purports to work a forfeiture of this defendant's right so to carry on its business in the State of Colorado, impairs
14 the obligations of said contract and is null and void.

7. That said Act of March 22, 1902, in so far as it purports by Section 66 thereof to provide that the failure of a corporation to pay the tax provided for in Sections 64 and 65 of said Act may be pleaded and maintained as an absolute defense to any and all actions, suits, or proceedings at law or in equity brought or maintained by or on behalf of such corporation in any court of competent jurisdiction within the limits of the State of Colorado until such tax is paid, is in violation of Section 6 of Article II of the Constitution of the State of Colorado.

8. That said Act entitled: "An Act in relation to public revenue, and repealing all previous Acts or parts of Acts in conflict therewith," approved March 22, 1902, in so far as it purports to provide by Section 66 thereof for a forfeiture of the right of a corporation to do business within the State of Colorado, attempts to deprive persons of property without due process of law, and is in violation of paragraph 1 of Article XVI of the Amendments to the Constitution of the United States.

9. That said Act of March 22, 1902, impairs the obligation of contracts, and is in violation of clause 1 of Section X of Article I of the Constitution of the United States.

15 10. That it appears by the allegations of the complainant and information that prior to the passage of the Act entitled: "An Act in relation to public revenue, and Repealing all previous Acts, or parts of Acts, in conflict therewith," approved March 22, 1902, and on, to-wit, the 28th day of April, 1899, this defendant, having then an authorized capital stock of $65,000,000, complied with the then existing laws of the State of Colorado and filed with the Secretary of State of the State of Colorado, certified copy of the laws of the State of New Jersey, under which this defendant was organized, and a certified copy of its Articles of Incorporation and its appointment of agent upon whom process could be served, which filing could only be made by it upon the payment to the said Secretary of State of the State of Colorado of the sum of $9,792.50, under the provisions of an Act entitled: "An Act concerning corporations," approved April 13, 1897. That it further appears from the allegations of the complaint and information that on or about the 17th day of May, 1901, and before the passage of the said Act of March 22, 1902, this defendant filed with the Secretary of State of the State of Colorado its certificate of increase of its capital stock, fixing the aggregate amount thereof at $100,000,000, which filing it could make only upon the payment of the further sum of $5,250. And this defendant represents unto the court that by the payment
16 of the said sums aggregating $15,042.50, and by compliance with the laws of the State of Colorado then existing, this defendant acquired the contract right to carry on its business within the limits of the State of Colorado, and that it is entitled to the pro-

tection of clause 1 of Section X of Article I of the Constitution of the United States against any attempt to declare a forfeiture of its said right so to do business within the said State of Colorado, and that the said Act of March 22, 1902, in so far as it purports to work a forfeiture of this defendant's right to so carry on its business within the limits of the said State of Colorado, impairs the obligation of said contract and is null and void.

WOLCOTT, VAILE AND WATERMAN,
Attorneys for Respondent.

(Endorsed:) No. 35298. District Court City and County of Denver. The People of the State of Colorado *ex rel* Henry A. Lindsley, District Attorney for the Second Judicial District, Plaintiff, *vs.* The American Smelting and Refining Company, a Corporation, Respondent. Demurrer of the respondent to the Complaint and Information for a Writ of Quo Warranto. Filed in District Court City and County of Denver, Mar. 3, 1903, Otis B. Spencer, Clerk. Wolcott, Vaile & Waterman, Denver, Colorado.

And afterwards, and on, to-wit, the 24th day of June, A. D.
17 1903, the same being one of the regular juridical days of the April Term, 1903, of said court, the following proceedings *inter alia* were had and entered of record in said court, to-wit:

35293.

THE PEOPLE OF THE STATE OF COLORADO *ex Rel* H. A. LINDSLEY ETC.,
vs.
THE AMERICAN SMELTING AND REFINING COMPANY.

At this day come the parties hereto by their attorneys respectively; and thereupon this cause coming on to be heard upon the demurrer of the respondent to the complaint and information for a writ of *quo warranto* herein, is argued by counsel, and the court not being sufficiently advised in the premises, doth take the same under advisement for its further consideration.

And afterwards, and on, to-wit, the 17th day of August, A. D. 1903, the following proceedings *inter alia* were had and entered of record in said court, to-wit:

35293.

THE PEOPLE OF THE STATE OF COLORADO *ex Rel* HENRY A. LINDSLEY ETC.,
vs.
THE AMERICAN SMELTING AND REFINING COMPANY.

18 This cause having heretofore been submitted to the court upon the demurrer of said respondent to the complaint and information and by the court taken under advisement, and the court

being now fully advised in the premises, doth overrule said demurrer; and on motion of respondent, it is ordered by the court that time and until thirty days from this day be allowed said respondent within which to answer the complaint and information herein, or within which to elect.

And afterwards, and on, to-wit, the 16th day of September, A. D. 1903, came the respondent by its attorneys, Messrs. Wolcott, Vaile & Waterman, and filed herein his answer;

And said answer is in words and figures as follows, to-wit:

STATE OF COLORADO, *City and County of Denver, ss:*

In the District Court.

No. 35293.

THE PEOPLE OF THE STATE OF COLORADO on the Relation of HENRY A. LINDSLEY, District Attorney for the Second Judicial District of the State of Colorado, Plaintiff,

vs.

AMERICAN SMELTING AND REFINING COMPANY, a Corporation, Respondent.

19 *Answer to the Complaint and Information.*

Comes now the respondent, American Smelting and Refining Company, and for answer to the complaint and information herein, alleges and says:

That the respondent, American Smelting and Refining Company, is now and ever since the 4th day of April, A. D. 1899, has been a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, authorized by its articles of incorporation to transact the business therein specified not only within the limits of the said State of New Jersey, but also in the various other States of the United States and Republic of Mexico and elsewhere.

That on or about the 28th day of April, A. D. 1899, the respondent, being a corporation as aforesaid, pursuant to the Statutes of the State of Colorado in such case made and provided, and in strict compliance with all the laws and statutes of the said State of Colorado then existing relating to the doing of business within the said State of Colorado by foreign corporations did file with and in the office of the Secretary of State of the State of Colorado a copy of its charter or certificate of incorporation duly certified and authenticated by the Secretary of State of the said State of New Jersey, and also a copy of the general incorporation laws of the said State of New Jersey

20 under and by virtue of which the respondent was incorporated as aforesaid, duly certified and authenticated by the said Secretary of State of the said State of New Jersey, and paid as fees to the said Secretary of State of the State of Colorado for the

leave, permission and right to do business within the limits of the State of Colorado for the full period of twenty (20) years from and after the 28th day of April, A. D. 1899, the full sum of nine thousand, seven hundred ninety-two dollars and fifty cents ($9,792.50), under and by virtue of the provisions of an Act of the General Assembly of the State of Colorado, entitled: "An Act Concerning Corporations," approved April 13, 1897.

That on said 18th day of April, A. D. 1899, the respondent did also file with and in the office of the Secretary of State of the State of Colorado, a certificate signed by its president and secretary, duly acknowledged, designating the City of Denver, then in the County of Arapahoe, in the State of Colorado, as the principal place of business of the respondent within the said State of Colorado, and also designating and appointing one James B. Grant, then a resident of the said city of Denver, as the authorized agent of the respondent upon whom process might be served; that the said certificate last aforesaid was signed, sealed and acknowledged by the president and secretary of the respondent on, to-wit: the 25th day of
21 April, A. D. 1899, and that for the filing of the said certificate last aforesaid the respondent paid all the fees required of the respondent by the statutes and laws of the State of Colorado, for filing the same.

That on the said 28th day of April, A. D. 1899, the respondent also filed in the office of the recorder of deeds of the County of Arapahoe in the State of Colorado, the county within which the city of Denver was then situated, a certificate duly signed, sealed and acknowledged by the president and secretary of the respondent, in and by which the said city of Denver was designated as the principal place where the business of the respondent should be carried on in the said State of Colorado, and in and by which the respondent duly appointed one James B. Grant, then a resident of the said city of Denver, as its authorized agent upon whom process might be served, and that for the filing of said certificate last aforesaid the respondent paid all the fees required of the respondent by the statutes and laws of the State of Colorado for filing the same.

That upon the said 28th day of April, A. D. 1899, the respondent filed each and every paper, certificate, statute and law then necessary or required by the laws and statutes of the State of Colorado, and paid all the fees then required by the existing statutes and laws of the State of Colorado for the leave, license, privilege and right
22 to transact its business within the said State of Colorado.

That by reason of the filing of the said papers, statutes and laws aforesaid, and the payment of the fees aforesaid, the respondent was permitted and authorized by the State of Colorado to transact its business within the said State of Colorado as a foreign corporation, under and by virtue of the laws of the said State of Colorado then existing, and by virtue of full, complete and strict compliance with all the laws and statutes of the State of Colorado then existing in relation to the doing of business within the said State of Colorado by foreign corporations.

That on the said 28th day of April, A. D. 1899, the authorized

capital stock of the respondent was the sum of sixty-five million dollars ($65,000,000), divided into shares of the par value of one hundred dollars ($100) each.

That thereafter and on, to-wit, the 8th day of April, A. D. 1901, the respondent filed with and in the office of the Secretary of State of the State of New Jersey, in full compliance with the laws of the said State of New Jersey, a duly signed, sealed and acknowledged amendment to its certificate of incorporation, and by said amendment increased the amount of the capital stock of the respondent from sixty-five million dollars, ($65,000,000) to one hundred million dollars ($100,000,000), divided into shares of the par value
23 of one hundred dollars ($100) each; that the amount of the capital stock of the respondent is still fixed and remains at the sum of one hundred million dollars ($100,000,000).

That thereafter and on, to-wit, the 17th day of May, A. D. 1901, the respondent filed with and in the office of the Secretary of State of the said State of Colorado a copy of the said amendment to its said certificate of incorporation duly certified and authenticated by the Secretary of State of the said State of New Jersey, and then and there paid to the said Secretary of State of the State of Colorado, as fees, the full sum of five thousand two hundred and fifty dollars ($5,250), in full and strict compliance with each and every law and statute of the State of Colorado then existing, relating to the doing of business in the said State of Colorado by foreign corporations.

That on the said 17th day of May, A. D. 1901, the respondent also filed with and in the office of the recorder of deeds of the said county of Arapahoe a copy of the said amendment, duly certified and authenticated by the said Secretary of State of the State of New Jersey, and paid to the said recorder of deeds of the said county of Arapahoe the fees then required by law for such filing.

That thereupon and on, to-wit, the 21st day of May, A. D. 1901, the Secretary of State of the State of Colorado, being there-
24 unto duly authorized by the statutes and laws of the said State of Colorado in such case made and provided, the respondent having then and there fully and strictly complied with all the laws and statutes of the State of Colorado then existing in relation to the doing of business in the State of Colorado by foreign corporations, did execute and deliver to the respondent a certificate of authority under his hand and under the great seal of the State of Colorado, reciting and certifying that the respondent had made full payment of all fees prescribed by law to be paid to the Secretary of State of the State of Colorado and due at the time of the issuance of said certificate of authority, and therein and thereby reciting that the respondent was authorized to exercise any corporate powers provided for by law. And this respondent says that it was then and there authorized and empowered by the said State of Colorado to transact and carry on its business within the said State of Colorado for the full period of twenty (20) years.

That the said certificate of authority, so authenticated and issued to the respondent, as aforesaid, was and is in the words and figures as follows, to-wit:

"STATE OF COLORADO:

OFFICE OF THE SECRETARY OF STATE.

Certificate of Authority.

25 "I, David A. Mills, Secretary of State of the State of Colorado, do hereby certify that, the American Smelting and Refining Company, under and by virtue of the provisions of 'An Act relating to corporations, and prescribing certain fees to be paid by corporations, foreign and domestic, and to repeal certain Acts and all Acts, and parts of Acts, in conflict herewith, approved April 6, 1901, have made, signed, acknowledged, and this twenty-eighth day of April, A. D. 1899, at the hour of 11:30 o'clock a. m., filed in my office their Certificate of Incorporation.

Now, therefore, Pursuant to the provisions of Section 10, of said Act, I hereby certify that the said company has made full payment of all fees prescribed by law to be paid to the Secretary of State, and due at the time of the issuing of this certificate, and is hereby authorized to exercise any corporate powers provided for by law.

In testimony whereof, I have hereunto set my hand and affixed the great seal of the State, at the city of Denver, this twenty-first day of May, A. D. 1901.

[Seal of the State of Colorado.]

DAVID A. MILLS,
Secretary of State."

That at the time of the execution and issuance of said certificate of authority, David A. Mills was the duly elected, qualified and
26 acting Secretary of State of the State of Colorado.

Respondent further alleges that the Thirteenth General Assembly of the State of Colorado convened in extra session at the Capitol on the 27th day of January, A. D. 1902, and thereafter attempted to pass, and pretended to pass, a certain statute or act entitled: "An Act in relation to public revenue, and repealing all previous Acts or parts of Acts in conflict therewith," that the said pretended Act last aforesaid was approved on, to-wit, the 22nd day of March, A. D. 1902.

That in and by said Act it was attempted to be provided, among other things, that each and every foreign corporation which had theretofore obtained, or which should thereafter obtain, the right and privilege to transact and carry on business within the State of Colorado should, in addition to the fees and taxes then provided for by law, and as a condition precedent to its right to do, or continue to do, business within the limits of the State of Colorado, pay annually on or before the first day of May of each year to the Auditor of State of the State of Colorado a State license tax, so called, of four (4) cents upon each one thousand dollars ($1,000) of its capital stock; and it was also attempted to be provided and enacted in said pretended Act, that in the event any corporation should neglect or

fail to pay such tax, within a certain time in said pretended
27 Act specified, such corporation, whether it had theretofore obtained the right and privilege to transact and carry on its business within the limits of the State of Colorado or not, should forfeit its rights to do business within the limits of the State of Colorado until such tax should be paid, and should be absolutely and wholly deprived of all its rights and privileges so to do business within the limits of the State of Colorado, and that the fact of such failure to pay such tax might be pleaded and maintained as an absolute defense to any and all actions, suits or proceedings, in law or in equity, brought or maintained by or on behalf of any such defaulting corporation in any court of competent jurisdiction within the limits of the State of Colorado, until such tax should be paid.

That the parts and portions of the said pretended Act, so approved as aforesaid on the 22nd day of March, A. D. 1902, providing for and relating to the said tax and the penalties for the non-payment thereof, appear in said act last aforesaid as Sections 64, 65, 66, 67 68 and 69 of said Act last aforesaid, and said sections of said Act last aforesaid were and are in the words and figures as follows, to-wit:

"SEC. 64. In addition to all other fees and taxes now provided for by law, every corporation which has heretofore obtained, or which shall hereafter obtain, a charter or certificate of incorporation
28 from this State, and having a capital stock of $25,000,00 or over, shall pay, on or before the first day of May of each year, or at the time of obtaining such charter or certificate of incorporation, and on or before the first day of May of each year thereafter, as the case may be, an annual State corporation license tax to the auditor of the State of Colorado, as follows:

Two cents upon each one thousand dollars of its capital stock."

"SEC 65. Every foreign corporation which has heretofore obtained, or which shall hereafter obtain, the right and privilege to transact and carry on business within the limits of the State of Colorado, shall, in addition to the fees and taxes now provided for by law, and as a condition precedent to its right to do any business within the limits of this State, pay annually, on or before first day of May of each year, or at the time of obtaining such right or privilege, and on or before the first day of May of each year thereafter, as the case may be, to the auditor of the State of Colorado, a State license tax as follows:

"Four cents upon each one thousand dollars of its capitaal stock; Provided, That in cases of foreign corporations the par value of whose shares of stock is less than one dollar per share, they shall pay as such tax at the rate of two and one-half cents per thousand shares."

29 "SEC. 66. Every corporation which shall have failed to pay the tax provided for in Sections 64 and 65, shall, by reason of such failure, forfeit its right to do business within the limits of this State until such tax is paid, and shall be absolutely and wholly deprived of all such rights and privileges, and the fact of such failure may be pleaded and maintained as an absolute defense to any and all actions, suits or proceedings, in law or in equity, brought or main-

tained by or on behalf of such corporation, in any court of competent jurisdiction within the limits of this State, until such tax is paid."

"SEC. 67. It shall be the duty of the State Auditor, immediately on the passage of this Act and on or before the first day of February annually hereafter in each year, to notify every corporation liable to tax hereunder, of the time of payment of such tax, and such notice shall contain a copy of this section and of Sections 64, 65 and 66."

"SEC. 68. It shall be the duty of the State Auditor within thirty days after the first day of every May, to notify in writing all such corporations as have forfeited their charters or their rights to do business within the State of Colorado, under the provisions of the foregoing sections, and any such corporation which shall, at any time after such notice, pay to the auditor the tax payable on or before the first day of May of that year and ten per cent. of said tax in addi-
30 tion thereto, for every six months or fractional part of six months, from the date of said notice, shall thereupon be relieved from the forfeiture of its charter or right to do business within the said State, by reason of such failure.

Nothing in Sections 64, 65, 66 and 67 shall be construed as imposing a license tax upon corporations chartered strictly for educational, social, literary, scientific, religious or charitable purposes, or ditch or irrigation corporations whose property is exempt by law from taxation, or upon charters incorporating Masonic lodges, Odd Fellows' lodges, or other fraternal or benevolent societies. But insurance companies not capitalized shall pay a yearly tax of one dollar per thousand on the gross premiums collected in this State, in addition to the other taxes and fees provided by law. Provided, That nothing in Sections 64, 65, 66 and 67 contained, shall be construed as applicable to organizations which conduct their business as fraternal societies on the lodge system, or which limit their certificate holders to a particular secret order or fraternity.

The auditor of the State shall, within thirty days after the receipt of any moneys collected by him under the foregoing sections, whether paid under protest or not, pay the same into the general treasury of the State, and shall take, at the time of such payment, a receipt or receipts from the State treasurer, showing upon its
31 face the exact amount of such moneys paid to said treasurer, and on what account and from what source the same was derived. The fees provided for in Sections 64 and 65 are in addition to the other fees and taxes provided by law."

"SEC. 69. For the purpose of the foregoing tax the fiscal year for basing such tax shall begin with May first of each year, and end with April thirtieth of the succeeding year, and that the foregoing prescribed tax shall apply to each fiscal year, or fractional part thereof."

That the only sections in said Act, so approved as aforesaid on the 22nd day of March, A. D. 1902, in any way whatever relating to the said tax are the said sections numbered from Section 64 to Section 69, both inclusive.

Respondent further says that the complaint or information herein is predicated and founded upon the aforesaid provisions and sections,

and none other, of the said pretended Act, so approved as aforesaid on the 22nd day of March, A. D. 1902.

Respondent further says that prior to the time of the attempted passage or approval of the pretended act last aforesaid specified, the respondent had complied in every respect, fully and completely, with every requirement of every law and every statute of the
32 State of Colorado in relation to the doing or transacting of business within the limits of the State of Colorado by foreign corporations, and had paid in full all the fees and charges, of every kind and character, required to be paid by the then existing laws and statutes of the State of Colorado by foreign corporations for the privilege and right to do business within the limits of the State of Colorado, and had filed all the certificates, papers, laws and statutes required by any law of the State of Colorado then existing in that behalf, with the proper officers in the said State of Colorado.

That by virtue of the full and complete compliance with all the laws and statutes of the State of Colorado relating to the doing of business by foreign corporations within the State of Colorado, the respondent became and was by the State of Colorado fully authorized and empowered to transact and carry on its lawful business within the limits of the State of Colorado for the full period of twenty (20) years from and after the 28th day of April, A. D. 1899, and was thereafter and again, and on, to-wit, the 21st day of May, A. D. 1901, further authorized and empowered by the State of Colorado to carry on and transact its lawful business within the limits of the State of Colorado for the full period of twenty (20) years, by reason of the full and strict compliance with all the laws and statutes of the State of Colorado then existing, and by virtue of the authority and
33 certificate of authority issued to the respondent by the State of Colorado, by and through the Secretary of State, and under the great seal of the State of Colorado.

That at that time, to-wit, on the 17th day of May, A. D. 1901, the respondent had paid to the State of Colorado for the license, privilege and right to do, carry on and transact its business within the limits of the State of Colorado the full sum of fifteen thousand forty-two dollars and fifty cents ($15,042.50), and by virtue of filing its said certificates and the duly authenticated incorporation laws of the State of New Jersey, and the appointment of its authorized agent upon whom process might be served, and the payments aforesaid, and the laws and statutes of the State of Colorado aforesaid, the respondent acquired the right by contract with the State of Colorado, under the laws and statutes thereof, to do, carry on and transact its lawful business within the limits of the State of Colorado for the full period of twenty (20) years, and has been ever since the 28th day of April, A. D. 1899, and still is, entitled to the protection of Section 2 of Article II of the Constitution of the State of Colorado, and clause 1, Section 10, Article I of the Constitution of the United States against any attempt of the General Assembly of the State of Colorado, or any other authority, to declare a forfeiture of its said contract
34 right so to do, carry on and transact its lawful business within the limits of the State of Colorado; and that the said pre-

tended act, so approved as aforesaid on the 22nd day of March, A. D. 1902, in so far as it purports or attempts to work a forfeiture of the respondent's right so to do, carry on and transact its lawful business within the limits of the State of Colorado, impairs the obligation of said contract right and is null and void, in contravention of the Constitution of the State of Colorado and the Constitution of the United States.

That the said pretended Act, so approved as aforesaid on March 22, 1902, in so far as it purports or attempts by said Section 66 thereof to provide that the failure of the respondent to pay the tax, attempted to be provided for in said Sections 64 and 65 of said pretended Act, may be pleaded and maintained as an absolute defense or bar to any or all actions, suits or proceedings at law or in equity, brought or maintained on behalf of any corporation, including this respondent, failing to pay such tax in any court of competent jurisdiction within the limits of the State of Colorado until such tax is paid, is in violation and contravention of Section 6 of Article II of the Constitution of the State of Colorado, in that the provisions of said Section 66 attempt to deny to the respondent the constitutional right and guaranty that the courts of justice of the State of
35 Colorado shall be open to this respondent, and a speedy remedy afforded to the respondent, and the administration of right and justice without sale, denial or delay.

That the said pretended Act, so approved as aforesaid on March 22, 1902, in so far as it purports or attempts to provide, by Section 66 thereof, for a forfeiture of the right of this respondent, or any other corporation, to do, carry on or transact its lawful business within the limits of the State of Colorado, attempts to deprive persons, and this respondent, of property without due process of law, and is in violation of paragraph 1 of Article XIV of the amendments to the Constitution of the United States.

That the said pretended act, so approved as aforesaid on March 22, 1902, attempts to impair, and does impair, the obligation of contracts, and attempts to impair, and does impair the obligation of the said contract made and entered into by and between this respondent and the State of Colorado permitting this respondent to do, carry on and transact its lawful business within the State of Colorado, and is in violation of clause 1 of Section 10 of Article I of the Constitution of the United States.

That said pretended act, approved March 22, 1902, in so far as it purports to provide, by Section 66 thereof, for the forfeiture of the right of this respondent, or of any other corporation, to do,
36 carry on and transact its lawful business within the limits of the State of Colorado, upon failure to pay the said tax provided to be paid in Sections 64 and 65 of said pretended act, attempts to cover and embrace, and does cover and embrace, a subject not relating to public revenue, and a subject different from any other subject matter contained in said pretended act, and a subject matter not expressed in the title of said pretended act; and the provisions of said Section 66 of said pretended act are in violation of Section 21 of Article V of the Constitution of the State of Colorado.

That the said pretended act, approved March 22, 1902, and the provisions thereof, are in violation of paragraph 1 of Article XIV of the amendments to the Constitution of the United States, in that they deny to this respondent the equal protection of the laws in this, that corporations organized and existing under and by virtue of the laws of the State of Colorado having a capital stock of twenty-five thousand dollars ($25,000) or over are assessed and taxed thereby only two (2) cents upon each one thousand dollars ($1,000) of capital stock, while the respondent is assessed and taxed thereby the sum of four (4) cents upon each one thousand dollars ($1,000) of its capital stock. And this respondent is further denied the equal protection of the laws in that corporations organized under the laws of the
37 State of Colorado and having a capital stock of less than twenty-five thousand dollars ($25,000) are exempt from any assessment or tax upon their capital stock.

That previous to the passage of the said pretended act, approved March 22, 1902, a large number of corporations were formed under and by virtue of the laws of the State of Colorado which had a capital stock of less than twenty-five thousand dollars ($25,000), and that such corporations still exist and are doing business within the limits of the State of Colorado, and are exempt by the provisions of said pretended act from the payment of any tax whatever upon their capital stock.

That the said pretended act, approved March 22, 1902, is in violation of Section 3 of Article X of the Constitution of the State of Colorado in this, that the said tax attempted to be assessed and levied thereby upon the capital stock of corporations doing business within the State of Colorado is not uniform upon the same class of subjects, in that the capital stock of this respondent is divided into shares of one hundred dollars ($100) each, and this respondent is compelled and required by the said pretended act to pay a tax of four (4) cents upon each one thousand dollars ($1,000) of its capital stock; while corporations organized and existing under the laws of the State of Colorado, created and existing prior to the passage and approval of said pretended act, and having a capital stock of less
38 than twenty-five thousand dollars ($25,000), are exempt from any taxation whatever under the provisions of said pretended act upon their capital stock; while corporations organized and existing under and by virtue of the laws of the State of Colorado having a capital stock of twenty-five thousand dollars ($25,000) or more are required by said pretended act to pay only the sum of two (2) cents upon each one thousand dollars ($1,000) of their capital stock.

That the tax upon the capital stock of foreign corporations attempted to be assessed and levied by the said pretended act is not uniform, in that the tax attempted to be assessed and levied thereby upon the capital stock of this respondent is four cents on each one thousand dollars ($1,000) of capital stock, while upon the capital stock of foreign corporations whose shares of stock are less than one dollar ($1.00) per share the tax assessed and levied by said pretended act is at the rate of two and one-half (2½) cents per thousand shares.

That by reason of the exemption of corporations organized and ex-

isting under and by virtue of the laws of the State of Colorado having a capital stock of less than twenty-five thousand dollars ($25,000) from any tax whatever upon their capital stock, and the assessment of a tax of only two (2) cents upon each one thousand dollars
39 ($1,000) of the capital stock of corporations organized and existing under a- by virtue of the laws of the State of Colorado having a capital stock of twenty-five thousand dollars ($25,000) or more, and the assessment and levy of four (4) cents upon each one thousand dollars ($1,000) of the capital stock of this respondent, and the assessment and levy of a tax in a different amount upon the capital stock of foreign corporations whose shares of stock are less than one dollar ($1) per share, this respondent is denied the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States, and is denied a uniformity of taxation as guaranteed by Section 3 of Article X of the Constitution of the State of Colorado.

This respondent further says that there are now, and there were previous to the attempted passage or approval of the said pretended Act, approved March 22, 1902, foreign corporations organized and existing under and by virtue of the laws of States in the United States other than the State of Colorado, whose shares of stock were and are less than one dollar per share and which were authorized to transact and carry on, and were transacting and carrying on, their business within the limits of the State of Colorado, and authorized so to do by the State of Colorado prior to the pretended passage or approval of said pretended Act by virtue of a full and complete compliance with all the laws of the State of Colorado then ex-
40 isting in relation to the doing of business within the limits thereof by foreign corporations, and by virtue of a full payment of all the fees required by the statutes and laws of the State of Colorado then existing to be paid for the right and privilege to transact their business within the limits of the State of Colorado, and many of such foreign corporations whose shares of stock were less than one dollar ($1.00) per share, so transacting and authorized to transact their business within the limits of the State of Colorado, still continue to transact their business within the limits of the State of Colorado.

Respondent further says that by reason of the payment of the said sums aggregating $15,042.50, and by reason of a full and strict compliance with all the laws and statutes of the State of Colorado then existing, this respondent acquired the right by contract with the State of Colorado to do, carry on and transact its lawful business within the limits of the said State of Colorado, and is entitled to the protection of clause 1 of Section 10 of Article I of the Constitution of the United States against any attempt to declare a forfeiture of its said right so to do, carry on and transact its lawful business within the limits of the State of Colorado, and to maintain, prosecute and defend any and all sorts of suits, actions, and proceedings in the State of Colorado and the courts thereof. And in so far as the said
41 pretended act, approved March 22, 1902, purports or attempts to work a forfeiture of this respondent's said contract right

so to do, carry on and transact its lawful business within the limits of the State of Colorado and to prosecute and defend any and all suits, both at law and in equity, in the courts of the State of Colorado, it impairs the obligation of this respondent's contract with the said State of Colorado and is unconstitutional, null and void.

This respondent further alleges that it uses its said capital of one hundred million dollars ($100,000,000) not only in the State of Colorado but in the States of New York, New Jersey, Pennsylvania, Illinois, Missouri, Nebraska, Utah, Idaho, Montana, and in the Territory of New Mexico, and in the Republic of Mexico, and that the greater part and portion of its said capital is so employed and used outside of the limits of the State of Colorado.

This respondent further says that of its said capital of one hundred million dollars ($100,000,000), more than one million dollars, ($1,000,000) has been invested in property and in improvements, and in the purchase of smelting plants and real estate, within the limits of the State of Colorado, all of which is used in connection with the transaction of its business within the limits of the said State of Colorado, and that the said sum of more than one
42 million dollars ($1,000,000), so invested as aforesaid, was permanently invested as aforesaid prior to the pretended passage or approval of the said pretended act, approved March 22, 1902, and that the said investments, so made as aforesaid by this respondent in the said State of Colorado, were made in reliance upon its said contract with the State of Colorado, which gave and granted to this respondent for the period of twenty (20) years the contract right to do, carry on and transact its lawful business within the State of Colorado, which contract right was given and granted to this respondent by the State of Colorado in consideration of the payments aforesaid made by this respondent to the State of Colorado, and in consideration of the full and strict compliance with all the laws and statutes of the State of Colorado in relation to the doing of business in said State by foreign corporations.

That by the provisions of said pretended Act, approved March 22, 1902, it is attempted to be declared and enacted, notwithstanding the existence of the contract aforesaid, that if this respondent, or any other foreign corporation, shall default in the payment of the said pretended tax, it shall not be permtited to do, carry on or transact its lawful business within the State of Colorado or defend actions in the courts of the State of Colorado; all of which is in contravention and violation of the terms of said contract.

43 This respondent further says that the said pretended tax of four (4) cents upon each one thousand dollars ($1,000) of capital stock of this respondent, attempted to be provided and required to be paid by this respondent under the terms of said pretended Act, is a tax upon the property of this respondent, and not only upon the property of this respondent situated within the State of Colorado, but also upon all its other property lying outside of the limits of the State of Colorado.

This respondent further answering, says that it was and is organized and existing as a corporation as aforesaid for the purpose,

among other things, of acquiring, dealing in, selling and otherwise disposing of ores, minerals and metals, and for the purpose of smelting, reducing, refining, milling and otherwise treating ores, minerals and metals, and for the purpose of manufacturing, acquiring, dealing in, selling and otherwise disposing of the products of ores, minerals and metals.

That the respondent, subsequent to the 28th day of April, 1899, pursuant to the authority of its certificate of incorporation and under and by virtue of its said contract with the State of Colorado, acquired by purchase within the State of Colorado, several smelting plants for the reduction, treatment and smelting of ores containing valuable metals, and ever since the year 1899 the respondent has been and still is the owner of said smelting plants as so purchased,
44 and has been and still is operating the same.

That this respondent, in carrying on and transacting its lawful business and in operating its said smelting plants within the limits of the State of Colorado, has at all times since the year 1899 purchased and is still purchasing continually large quantities of ores containing valuable metals in various the Territories and States of the United States other than the State of Colorado, and also in the Republic of Mexico, and at all of said times has been shipping and still continues to ship such ores so purchased to its said smelting plants within the State of Colorado for the purpose of treating and smelting the same at its said smelting plants located in the State of Colorado.

That the respondent, ever since the year 1899, has been and still is treating, reducing and smelting such ores so purchased outside of the State of Colorado and extracting the valuable metals therein contained at its said *sam*ilting plants in the State of Colorado, and has been at all of said times and still is shipping the valuable metals so extracted from the said ores so purchased outside of the State of Colorado as aforesaid to the eastern markets outside of the State of Colorado and in States of the United States other than the State of Colorado, and has been at all the times aforesaid and still is selling the metals so extracted from said ores so purchased outside of
45 the State of Colorado in the eastern markets outside of the State of Colorado and in States of the United States other than the State of Colorado.

And this respondent says that all of the said ores so purchased as aforesaid outside of the State of Colorado by this respondent are shipped to its said smelting plants within the State of Colorado for the sole and only purpose of extracting therefrom the valuable metals therein contained, and that the valuable metals therein contained when so extracted are forthwith shipped outside of the State of Colorado and sold in markets entirely outside of the State of Colorado.

This respondent, further answering, says that ever since the year 1899 citizens and residents of Territories and States of the United States other than the State of Colorado have been consigning and shipping and still are consigning and shipping large quantities of ores containing valuable metals to this respondent at its smelting

plants within the State of Colorado, for the sole and only purpose of having the metals contained in such ores extracted therefrom by this respondent at its said smelting plants in the said State of Colorado; that this respondent forthwith ascertains the value of such ores and purchases the same from the owners thereof, and pays for the same, and thereupon immediately extracts the valuable metals from such ores within the State of Colorado and ships such
46 metals forthwith out of the State of Colorado and sells the same upon the market in States of the United States other than the State of Colorado.

This respondent further says that by reason of the fact that it purchases ores outside of the State of Colorado and ships the same to its smelting plants in the State of Colorado, and at such smelting plants extracts the valuable metals contained in such ores, and ships such valuable metals so extracted from such ores to markets located outside of the State of Colorado and in States of the United States other than the State of Colorado and there sells the same, and by virtue of the fact that citizens and residents of the Territories of the United States and States of the United States other than the State of Colorado consign and ship their ores to this respondent within the State of Colorado for the purpose of having the valuable metals therein contained extracted by this respondent, and receive the value of such ores from this respondent, this respondent is engaged in interstate commerce and its business is that of commerce among the several States and the citizens thereof, and that the said tax of four cents upon each one thousand dollars of the capital stock of this respondent so attempted to be assessed and levied as aforesaid by the General Assembly of the State of Colorado is a tax upon interstate commerce and a tax upon property imported into the State of Colorado
47 from Territories and States of the United States outside of the State of Colorado for the mere temorpary purpose of [illegible]ting and preparing the valuable parts and portions of such property for sale in the markets of the world outside of the State of Colorado, and is an attempted discrimination and regulation adverse to the citizens and property of the Territories and States of the United States other than the State of Colorado, and is therefore an unauthorized interference on the part of the General Assembly of the State of Colorado with the power given to the Congress of the United States by the Constitution thereof, over all matters in relation to commerce with foreign nations and among the several States, and is unconstitutional and void.

This requirement further says that the said pretended tax so attempted to be assessed and levied upon the capital stock of this respondent was and is a tax upon the property of this respondent, and that the same is not uniform with the taxes levied upon other property within the limits of the State of Colorado, nor uniform with the tax levied upon the capital stock of corporations organized and existing under and by virtue of the laws of the State of Colorado, nor uniform with the tax levied upon the capital stock of foreign corporations doing business within the State of Colorado whose shares are
48 of the par value of less than one dollar ($1.00) per share * * * and is arbitrarily assessed without any regard to

the value of the shares of stock upon which the said tax is attempted so to be assessed.

This respondent further says that the tax so attempted to be assessed and levied upon the capital stock of this respondent is four thousand dollars ($4,000) per year, and this action is predicated upon the failure of this respondent to pay the sum of four thousand dollars ($4,000) to the Auditor of State of the State of Colorado on or before the first day of May, A. D. 1902, and the further sum of four thousand dollars ($4,000) on or before the first day of May, A. D. 1903.

This respondent further says that all of its property within the limits of the State of Colorado has been at all times and is now being assessed and taxed for the purposes of general taxation and the support of the government in accordance with and under the provisions of the Statutes of the State of Colorado relating to taxation, and that all of the taxes so assessed and levied have been fully paid as the same became due and payable, and that no taxes of any kind or character whatever at any time assessed or levied against this respondent or its property in the State of Colorado remained unpaid, save only the said pretended tax of four cents upon each one thousand dollars of the capital stock of this respondent so at-
49 tempted to be assessed and levied as aforesaid, and this respondent says that the assessment and levy of four cents upon each one thousand dollars of the capital stock of this respondent is an attempt to subject the property of this respondent to double taxation and is an attempt to take the property of this respondent without due process of law.

Wherefore, this respondent, having fully answered, prays to be hence dismissed with its costs.

WOLCOTT, VAILE AND WATERMAN,
Attorneys for Respondent.

STATE OF COLORADO, *City and County of Denver, ss:*

Charles W. Waterman, of lawful age, being first duly sworn, on oath doth depose and say: That the respondent above named, American Smelting and Refining Company, is a corporation; that he is one of the attorneys for said respondent and authorized to make this verification; that he has read the foregoing Answer and knows the contents thereof, and that the same is true to the best of affiant's knowledge and belief.

CHARLES W. WATERMAN.

Subscribed and sworn to before me this 16th day of September, A. D. 1903.

50 My commission expires March 31, 1907.

J. AUGUSTIN GALLAHER,
[SEAL.] *Notary Public.*

(Endorsed:) No. 35293. District Court City and County of Denver. The People of the State of Colorado *ex rel* Henry A. Lindsley, District Attorney for the Second Judicial District, Plaintiff, *vs.*

American Smelting and Refining Company, a Corporation, Respondent. Answer to the Complaint and Information. Filed in District Court City and County of Denver September 16, 1903, Otis B. Spencer, Clerk. Wolcott, Vaile & Waterman, Counsellors at Law, Denver, Colorado.

And afterwards, and on, to-wit, the 13th day of September, 1903, came the plaintiff herein, by his attorney, and filed herein his Reply to the Answer.

STATE OF COLORADO, *City and County of Denver.*

In the District Court.

No. 35293.

THE PEOPLE OF THE STATE OF COLORADO on the Relation to HENRY A. LINDSLEY, District Attorney for the Second Judicial District of the State of Colorado, Plaintiff,

vs.

AMERICAN SMELTING AND REFINING COMPANY, a Corporation, Respondent.

51 Comes now the plaintiff, by N. C. Miller, Attorney-General of the State of Colorado, and without waiving his right and purpose to demur to said answer because the same does not state facts sufficient to constitute an answer to plaintiff's complaint and information:

I.

For a first reply to the answer in the above entitled cause, alleges: It admits each and every allegation in said answer not specifically denied in this reply, except those allegations in said answer of conflict between the Act entitled, "An Act in Relation to Public Revenue, and Repealing all Previous Acts or Parts of Acts in Conflict Therewith," approved March 22, 1902, and the constitution of the State of Colorado or the constitution of the United States, which allegations, and each and every of them, plaintiff denies.

It admits that the respondent, American Smelting and Refining Company, is now, and ever since the 4th day of April, A. D. 1899, has been a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, authorized by its articles of incorporation to transact the business therein specified, not only within the limits of the said State of New Jersey, but also in the various other States of the United States, the Republic of
52 Mexico, and elsewhere.

It admits that on or about the 28th day of April, A. D. 1899, the respondent being a corporation as aforesaid, pursuant to the statutes of the State of Colorado, in such case made and provided, and in strict compliance with the laws and statutes of the said State of Colorado, then existing, relating to the doing of business within

the said State of Colorado, by foreign corporations, did file with and in the office of the Secretary of State of the State of Colorado a copy of its charter or certificate of incorporation, duly certified and authenticated by the Secretary of State of the said State of New Jersey, and also a copy of the general incorporation laws of the said State of New Jersey, under and by virtue of which the respondent was incorporated as aforesaid, duly certified and authenticated by the said Secretary of State of the said State of New Jersey, and paid as fees to the Secretary of State of the State of Colorado the full sum of Nine Thousand Seven Hundred and Ninety-two Dollars and Fifty Cents ($9,792.50), under and by virtue of the provisions of an Act of the General Assembly of the State of Colorado, entitled "An Act Concerning Corporations," approved April 13, 1897; but

plaintiff denies that the said fees were paid by respondent for the leave, permission and right to do business within the limits
53 of the said State of Colorado for the full period of twenty years from and after the 28th day of April, A. D. 1899; but, on the contrary, alleges that said fees were paid by the defendant and accepted by the State of Colorado, subject to the right, on the part of the State, to require defendant to comply with all laws subsequently passed by the General Assembly of said State after the payment of said fees.

This plaintiff admits that on the 28th day of April, A. D. 1899, the respondent did also file with and in the office of the said Secretary of State of the State of Colorado, a certificate signed by the President and Secretary, duly acknowledged, designating the City of Denver, then in the County of Arapahoe, in the State of Colorado, as the principal place of business of the respondent, within the said State of Colorado, and also designating and appointing one James B. Grant, then a resident of the said City of Denver, as the authorized agent of the respondent, upon whom process might be served; that the said certificate last aforesaid was signed, sealed and acknowledged by the President and Secretary of the respondent on, to-wit, the 25th day of April, A. D. 1899, and that for the filing of the said certificate, last aforesaid the respondent paid all fees required of the respondent by the statutes and laws of the State of Colorado for filing the same.

54 Plaintiff further admits that on the 28th day of April, A. D. 1899, the respondent also filed in the office of the Recorder of Deeds of the County of Arapahoe, in the State of Colorado, and the county within which the City of Denver was then located, a certificate, duly signed, sealed and acknowledged by the President and Secretary of the respondent, in and by which the said City of Denver was designated as the principal place where the business of the respondent should be carried on in the said State of Colorado, and in and by which the respondent duly appointed one James B. Grant, then a resident of the said City of Denver, as its authorized agent, upon whom process might be served, and that for the filing of the said certificate last aforesaid the respondent paid all the fees then required of the respondent by the statutes and laws of the State of Colorado, for filing the same.

Plaintiff further admits that upon said 28th day of April, A. D. 1899, respondent filed each and every paper certificate, statute and law then necessary or required by the laws and statutes of the State of Colorado, and paid all the fees then required by the existing statutes of the State of Colorado for theprivilege to transact its business within the said State of Colorado; but

55 plaintiff denies that said privilege was obtained free from the obligation to comply with any and all laws thereafter to be passed.

Plaintiff admits that on the 28th day of April, A. D. 1899, the authorized capital stock of respondent was the sum of Sixty-five Million Dollars ($65,000,000), divided into shares of the par value of One Hundred Dollars ($100) each.

It admits that thereafter and on, to-wit: the 8th day of April, A. D. 1901, the respondent filed with, and in the office of the Secretary of State of the State of New Jersey, in due compliance with the laws of the said State of New Jersey, a duly signed, sealed and acknowledged amendment to its certificate of incorporation, and by said amendment increased the amount of the capital stock of respondent from Sixty-five Million Dollars ($65,000,000) to One Hundred Million Dollars ($100,000,000), divided into shares of the par value of One Hundred Dollars ($100) each; and that the amount of the capital stock of respondent is is still fixed and remains at the sum of One Hundred Million Dollars ($100,000,000).

It admits that thereafter and on, to-wit: the 17h day of May, A. D. 1901, the respondent filed with and in the office of the Secretary of State of the State of Colorado, a copy of its amendment to its certificate of incorporation duly certified and authenticated

56 by the Secretary of State of the said State of Colorado, a copy of its amendment to its certificate of incorporation, duly certified and authenticated by the Secretary of State of the said State of New Jersey, and then and there paid to the Secretary of State of the State of Colorado, as fees, the full sum of Five Thousand Two Hundred and Fifty Dollars ($5,250), in full and strict compliance with each and every law and statute of the State of Colorado, then existing, relating to the doing of business in the State of Colorado by foreign corporations.

Plaintiff admits that on the 17th day of May, A. D. 1901, the respondent filed in the office of the Recorder of Deeds of the County of Arapahoe a copy of said amendment, duly certified and authenticated by the Secretary of State of the State of New Jersey, and paid to said Recorder the fees required by law for such filing.

Plaintiff further admits that on, to-wit, the 21st day of May, A. D. 1901, the Secretary of State of the State of Colorado did execute and deliver to the respondent a certificate of authority under his hand and under the great seal of the State of Colorado, reciting and certifying that the respondents had made full payment of all fees prescribed by law to be paid to the Secretary of State of the State

57 of Colorado, and due at the time of *of* the issuance of said certificate, and reciting that the respondent was authorized

to exercise any corporate powers provided for by law, and this plaintiff admits that at the time of furnishing said certificate the respondent had paid all fees then due the Secretary of State; but this plaintiff denies that respondent was then and there authorized and empowered by the said State of Colorado to transact and carry on its business within the State of Colorado for the full period of twenty years unconditioned upon its compliance with the laws subsequently passed by the General Assembly of the State of Colorado; but, on the contrary, it alleges that the respondent was then and there required to comply with all laws which might subsequently be passed by the General Assembly of said State.

This plaintiff admits that the certificate of authority alleged to have been executed by the Secretary of State in the said answer is correctly copied and set forth on page six of the answer.

Plaintiff further admits that David A. Mills was the duly elected, qualified and acting Secretary of State of the State of Colorado.

Plaintiff admits that the General Assembly of the State of Colorado, during the year 1902, passed an act, entitled "An Act
58 in relation to Public Revenue, and Repealing All Previous Acts or Parts of Acts in Conflict Therewith," and that the said Act last aforesaid was approved on the 22nd day of March, A. D. 1902, but

it denies that said Act is in whole or in part, invalid, void, or unconstitutional.

This plaintiff admits that said Act, approved March 22, 1902, contains the said sections 64, 65, 66, 67, 68 and 69, and that said sections are correctly copied and set forth on pages 8 and 9 of said answer.

This plaintiff further admits that the respondent, prior to the passage and approval of the said Act, approved March 22, 1902, containing the said sections, had complied with every requirement of the laws of the State of Colorado then existing in relation to the doing or transacting of business within the limits of the State of Colorado by foreign corporations, and had paid in full all fees and charges of every kind and character required to be paid by the then existing laws and statutes of the State of Colorado by foreign corporations for the privilege and right to do business within the limits of the State of Colorado, and had filed all the certificates, papers, laws and statutes required by any law of the State of Colorado then existing in that behalf with the proper officer in the State of Colorado; but
59 this plaintiff alleges that under the laws and Constitution of the State of Colorado, then in force, the respondent was required to comply with all future laws which might be passed by the General Assembly of said State in reference to foreign corporations, and especially with the statutes relating to revenue which might be passed thereafter, and with any law which might be passed subsequently, requiring it to pay an annual license tax for the privilege of doing business in the State of Colorado.

This plaintiff denies that by virtue of the full and complete compliance with all the laws and statutes of the State of Colorado relating to the doing of business by foreign corporations within the State of Colorado, the respondent became, and was, by the State of Colorado, fully authorized and empowered to transact and carry on its lawful business within the limits of the State of Colorado for the full period of twenty years from and after the 28th day of April, A. D. 1899; and plaintiff denies that respondent was thereafter and again and on, to-wit, the 21st day of May, A. D., 1901, further authorized and empowered by the State of Colorado to carry on and transact its lawful business within the limits of the State of Colorado for the full period of twenty years by reason of the full and strict compliance with all the laws and statutes of the State of Colorado then existing, and by virtue of the authority and certificate of authority issued to
60 the respondent by the said State of Colorado, and by and through its Secretary and under the great seal of the State of Colorado; but, on the contrary, this plaintiff alleges that any privilege and license to do business within the limits of the State of Colorado by said respondent, was at any and all times subject to the obligation of said corporation to comply with all the laws which might be thereafter passed by the General Assembly of said State, and with such statutes as might be enacted thereafter, imposing upon said corporation an annual license tax for the privilege of doing business in the said State.

This plaintiff admits that on, to-wit, the 17th day of May, A. D. 1901, the respondent had paid to the State of Colorado for the privilege of transacting busines within the State the full sum of Fifteen Thousand and Forty-two Dollars and Fifty Cents (15,042.50); but

it denies that, by virtue of the payment of said fee or sum, and filing of the certificates and incorporation laws of the State of New Jersey, and the appointment of its agent, under and by virtue of the laws of the State then existing, the respondents acquired the right by contract with the State of Colorado to carry on its business within the State of Colorado for the full period of twenty years.

And denies that the said sections 64, 65, 66, 67, 68 and 69, quoted in the answer from the said Act approved March 22, 1902,
61 impair the obligation of any contract right existing between the respondent and the State of Colorado, or that said sections, or any of them, impair the obligation of any contract, or that said sections, or any of them, are in contravention of the Constitution of the State of Colorado, or the Constitution of the United States, or in contravention of any provision of the Constitution of the State of Colorado, or of the Constitution of the United States.

This plaintiff admits that previous to the passage of said Revenue Act, approved March 22, 1902, a large number of corporations were formed under and by virtue of the laws of the State of Colorado, which had a capital stock of less than Twenty-five Thousand Dollars ($25,000), and that such corporations still exist and are doing business within the limits of the State of Colorado, and are exempt by

the provisions of the Act from the payment of any annual license tax computed upon their capital stock; but

denies that said exemption is in violation of any constitutional provision of the State of Colorado, or of the United States.

This plaintiff further replying, denies that the said sections 64, 65, 66, 67, 68 and 69 of said Act, approved March 22, 1902, or any of them, are in violation of any principle or provisions of the Constitution of the State of Colorado, requiring uniformity of taxes upon the same class of subjects, and denies that said tax is not uni-
62 form upon the same class of subjects, and denies that the said tax provided for in said sections is a tax upon the property; but, on the contrary, alleges that it is an annual license tax for the privilege of doing business within the State of Colorado, and acts uniformly and equally upon all subjects within the same class, and that the classification made by said sections for the purpose of revenue is not in violation of any principle or provision of the Constitution of the State of Colorado, or of the Constitution of the United States.

This plaintiff further admits that previous to the passage and approval of the said Revenue Act, approved March 22, 1902, there were foreign corporations doing business in the State of Colorado, whose shares of capital were, and are, less than one dollar per share, but this plaintiff alleges that the General Assembly of the State of Colorado had the right and constitutional power and authority to classify foreign and domestic corporations for the purpose of revenue, and impose an annual license tax upon them, and each of them, for the privilege of doing business within the State of Colorado; and that the classification made by said sections, or any of them, is not unjust, or unfair, nor is such classification made in violation of any principle or provision of the Constitution of the State of Colorado or of the United States; but, on the contrary, plaintiff alleges that
63 it operates justly and equally upon all subjects of the same class.

And this plaintiff denies that by reason of the payment of said sum, aggregating Fifteen Thousand and Forty-two Dollars and Fifty Cents ($15,042.50), and by reason of a full and strict compliance with all the laws and statutes of the State of Colorado then existing, the respondent acquired the right by contract with the State of Colorado to do, carry on and transact business within the said State of Colorado, except subject to the right of said State to require it to comply with all laws which might thereafter be passed by the General Assembly of said State, and especially with the said sections mentioned and complained of in the answer of the respondent.

And it denies that the forfeiture imposed upon the corporations by the said sections quoted from the said Revenue Act approved March 22, 1902, in the answer, impair the obligation of said respondent's alleged contract with the said State of Colorado, and denies that the said sections are unconstitutional by reason of working a forfeiture of its charter or right to do business in the State, unless it paid the said annual license tax assessed in said sections.

And this plaintiff admits that respondent uses its capital stock of One Hundred Million Dollars ($100,000,000), partially in the State of Colorado and partially in the State of New York, New
64 Jersey, Pennsylvania, Illinois, Nebraska, Utah, Idaho, Montana, and in the Territory of New Mexico and the Republic of Mexico, but

as to what portion of its capital stock is employed in the State of Colorado, this plaintiff has not and cannot obtain sufficient knowledge or information upon which to base a belief.

Admits that the investment of money in the capital stock of said corporation was made prior to the passage of the Revenue Act, approved March 22, 1902; but,

denies it was made in reliance upon its said alleged contract with the State of Colorado whereby it claims the right to do business for the full period of twenty years in said State unconditionally, as to laws subsequently to be passed in said State; and this plaintiff denies that said corporation has any contract to do business in the State of Colorado which relieves it from its obligation to comply with any of the laws which the General Assembly of said State might pass subsequent to the payment to the Secretary of State of the State of Colorado of the fees mentioned in the answer; but alleges that said State expressly reserved the right to assess against or impose upon any and all corporations doing business in the State of Colorado, an annual license tax for the privilege of doing business in said State, and that said reservation was contained in the statutes and Constitution of the State of Colorado at the time the respondent
65 herein claims to have obtained the alleged contract to do business in the State of Colorado for the full period of twenty years.

This plaintiff denies that the said tax of four (4) cents upon each one thousand dollars of the capital stock of the respondent is a tax upon the property of the respondent, but on the contrary, alleges that it is only an annual license tax for the privilege of doing business in the State of Colorado.

And this plaintiff admits that said respondent was and is organized as a corporation for the purpose, among other things, of acquiring, dealing in, selling and otherwise disposing of ores, minerals and metals, and for the purpose of smelting, reducing, refining, milling and otherwise treating ores, minerals and metals; and for the purpose of manufacturing, acquiring, dealing in, selling, and otherwise disposing of the products of minerals and metals.

Plaintiff further admits that the respondent subsequently, and on, to-wit, the 28th day of April, A. D. 1899, acquired by purchase within the State of Colorado, several smelting plants for the reduction, treatment and smelting of ores containing valuable metals, and that it has been ever since, and now is, the owner of said smelting plants so purchased, and is still operating the same; but

66 it denies that the said investment was made upon its reliance upon the alleged contract with the State of Colorado;

That as to whether or not the respondent, in the operation of its smelting plants within the limits of the State of Colorado, has at all times since the year 1899 purchased or is still purchasing large quantities of ore containing valuable metals in the various States and Territories of the United States, other than the State of Colorado, or also in the Republic of Mexico; and as to whether or not at all of said times the respondent has been shipping or still continues to ship such ore so purchased to its said smelting plants within the State of Colorado, for the purpose of treating or smelting the same at its smelting plants in the State of Colorado, this plaintiff has not and cannot obtain sufficient knowledge or information upon which to base a belief.

That as to whether or not since the year 1899 it has been and still is treating ores so purchased outside of the State of Colorado, or is extracting the value of the metals therein contained at its said smelting plants in the said State of Colorado, or has been at all times or still is shipping the valuable metals so extracted from the said ores so purchased outside of the State of Colorado, as aforesaid, to the eastern markets, outside of the State of Colorado, or in the States of the United States other than the State of Colorado; and as to whether or not respondent has been at all the times aforesaid,
67 or still is, selling the metals so extracted from said ores so purchased outside of the State of Colorado, in the eastern markets outside of the State of Colorado, or in the States of the United States other than the State of Colorado, this plaintiff has not and cannot obtain sufficient knowledge or information upon which to base a belief.

That as to whether or not all said ores so purchased, as aforesaid, outside of the State of Colorado by said respondent are shipped to its said smelting plants within the State of Colorado for the sole and only purpose of extracting therefrom the valuable metals therein contained, or that the valuable metals therein contained, when so extracted, are, forthwith, shipped outside of the State of Colorado and sold in its eastern markets entirely outside of the State of Colorado, this plaintiff has not and cannot obtain sufficient knowledge or information upon which to base a belief.

That as to whether or not ever since the year 1899 citizens and residents of Territories and States of the United States, other than the State of Colorado, have been consigning, shipping and selling, or are consigning and shipping large quantities of ores containing valuable metals to said respondent at its smelting plants within the State of Colorado, for the sole and only purpose of having the metals contained in such ores extracted therefrom by said respond-
68 ent at its said smelting plants in the State of Colorado; and as to whether or not respondent forthwith ascertains the value of such ores, and purchases the same from the owners thereof, and pays for the same, and thereupon immediately extracts the valuable metals from such ores within the State of Colorado, and ships such metals, forthwith, outside of the State of Colorado, and sells the same upon the markets in the States of the United States, other than the State of Colorado, this plaintiff has not and cannot obtain sufficient knowledge or information upon which to base a belief.

Plaintiff admits that the citizens of the various States of the United States ship ores to the plants of the respondent in Colorado for treatment; but

as to whether or not the respondent goes into the Territories of the United States, or the States of the United States other than the State of Colorado, or into the Republic of Mexico, or into any Territory outside of the State of Colorado and buys ore for the purpose of shipping the same to its plants in Colorado for treatment, or for any purpose, this plaintiff has not and cannot obtain sufficient knowledge or information upon which to base a belief; but avers that all ores shipped to the plants in Colorado by owners of such ores and received by the respondent at its plants in the State of Colorado, are subject to the laws of the State of Colorado, and the contract in relation to said ores is made under the laws of the State of Colorado; and denies that said respondent is engaged in any manner in interstate commerce.

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And it denies that the tax of four cents upon each one thousand dollars of the capital stock of respondent imposed and required by sections 64, 65, 66, 67, 68 and 69 of said Act, approved March 22, 1902, quoted in said answer, is a tax upon interstate commerce, or is a tax upon property shipped into the State of Colorado from Territories and States of the United States outside of the State of Colorado; and denies that said sections or any of them operate as a discrimination or regulation adverse to the citizens and property of the Territories and States of the United States other than the State of Colorado; and denies that said sections, or any of them, are an unauthorized interference, or any interference, on the part of the General Assembly of the State of Colorado with the power given to the Congress of the United States by the Constitution thereof over all matters in relation to commerce with foreign nations and among the several States;

And denies that said sections or any of them, are unconstitutional, or that they or any of them interfere with commerce between the States, or between the State of Colorado and any other State of the United States, or with foreign countries.

Plaintiff denies that the annual tax imposed by said sections, quoted in the answer upon the capital stock of respondent, is a tax upon the property of respondent.

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Plaintiff denies that the said annual license tax is not uniform upon all subjects belonging to the same class made by said sections; and denies that the said annual license tax is a tax imposed upon the property of respondent;

This plaintiff admits that all the property of respondent within the State of Colorado is assessed and taxed for the purposes of general taxation and for the support of the government in accordance with, and under the provisions of the statutes of the State of Colorado relating to taxation, and that all of the taxes so assessed and levied have been fully paid as the same became due and payable; but

this plaintiff denies that the tax levied under and by virtue of sections 64, 65, 66, 67, 68 and 69, quoted in the answer and taken from the said Revenue Act, approved March 22, 1902, imposes a double tax upon property of respondent, and denies that said sections, or any of them, attempt to take the property of respondent, without due process of law, but, on the contrary, plaintiff alleges that said tax is an annual license tax, imposed upon and collected of each and every corporation doing business within the State of Colorado for such privilege, and that the forfeiture spoken of and complained of by respondent results only in case and so long as respondent
71 fails to pay such tax, and the right to do business within the State of Colorado revives immediately upon the payment of said tax after default.

And for a further and second reply to the answer of defendant or respondent, plaintiff demurs to said answer, and for grounds of demurrer alleges:

That the said answer does not contain facts sufficient to constitute any defense to the complaint and information filed herein.

And plaintiff, as its grounds of demurrer herein, more particularly alleges the following to-wit:

A. That the facts alleged in said answer are not sufficient to justify the conclusion that the respondent acquired the right to do business in the State of Colorado for the full period of twenty years by reason of compliance with any statutes, or by reason of anything done under and by virtue of the provisions of an Act of the General Assembly of the State of Colorado, "An Act Concerning Corporations," approved April 13, 1897, or under and by virtue of compliance with any other statute of the State of Colorado.

B. That the said answer does not set forth facts sufficient to show that sections 64, 65, 66, 67, 68 and 69 of the Act approved March 22, 1902, set out in said answer are unconstitutional and invalid.

C. That said answer fails to show compliance by said de-
72 fendant or respondent with said sections 64, 65, 66, 67, 68 and 69 of said Act, approved March 22, 1902, set out in said answer, therefore admits the failure to comply with all of the laws and statutes of the State of Colorado relating to the doing of business by foreign corporation- within said State; and, therefore, said answer is deficient and insufficient, and shows that it has not complied with all the statutes essential to the maintenance of its right to do business for the full period of twenty years, from and after the 20th day of April, A. D. 1899.

D. That said answer fails to set forth facts sufficient to show that the respondent is engaged in interstate commerce, or that said sections 64, 65, 66, 67, 68 and 69 of said Act, approved March 22, 1902, are an unlawful and unjust interference with commerce between States or the citizens of different States.

E. That said answer fails to set forth facts sufficient to constitute any defense to plaintiff's complaint and information.

Wherefore, plaintiff having fully replied to the answer of said de-

fendant, or respondent, prays for judgment and costs as prayed in the complaint filed herein.

HENRY A. LINDSLEY,
District Attorney for the Second Judicial District of the State of Colorado, and the Judicial District Constituted by the City and County of Denver.

73 N. C. MILLER,
Attorney-General.
HENRY J. HERSEY,
Of Counsel.

STATE OF COLORADO, *City and County of Denver, ss:*

N. C. Miller, being first duly sworn, deposes and says that he is the attorney of record in the above entitled cause and knows of the contents of said reply, and that the matters and things contained therein are true of his own personal knowledge, except what is alleged on information and belief, and as to those allegations he believes the reply to be true.

N. C. MILLER.

Subscribed and sworn to before me this 7th day of October, A. D. 1903.

H. J. CLARK,
Clerk of Supreme Court, Colorado,
[SEAL.] By J. B. COOKE, *Deputy.*

74 (Endorsed:) No. 35293. In the District Court. The People of the State of Colorado *ex rel. vs.* American Smelting and Refining Company, a Corporation. Reply to Answer. Henry A. Lindsley, Dist. Atty. N. C. Miller, Attorney General, Henry J. Hersey, Of Counsel. Filed in District Court City and County of Denver, Sep. 13, 1903, Otis B. Spencer, Clerk.

And afterwards, and on, to-wit, the 7th day of December, A. D. 1903, the same being one of the regular juridical days of the September term 1903 of said court the following proceedings *inter alia* were had and entered of record in said court, to-wit:

35293.

THE PEOPLE OF THE STATE OF COLORADO *ex Rel.* H. A. LINDSLEY, ETC.,
vs.
THE AMERICAN SMELTING AND REFINING COMPANY.

At this day come the parties hereto by their attorneys respectively, and thereupon on motion of defendant, by consent.

It is ordered by the court that said defendant have leave to amend its answer herein by interlineation which is accordingly done.

35293.

THE PEOPLE OF THE STATE OF COLORADO *ex Rel.* HENRY A. LINDSLEY, ETC.,
vs.
THE AMERICAN SMELTING AND REFINING COMPANY, ETC.

75 At this day come the parties hereto by their attorneys respectively; and thereupon this cause coming on to be tried before the court without a jury, a jury herein being expressly waived by consent of both parties hereto, and the court having heard the evidence adduced and the arguments of counsel, and the court not being sufficiently advised in the premises, takes the matter under advisement for its further advisement.

And afterwards, and on, to-wit, the 18th day of January, A. D. 1904, the same being one of the regular juridical days of the January Term 1904 of said court, the following proceedings *inter alia* were had and entered of record in said court, to-wit.

35293.

THE PEOPLE OF THE STATE OF COLORADO *ex Rel.* HENRY A. LINDSLEY, ETC.,
vs.
THE AMERICAN SMELTING AND REFINING COMPANY, ETC.

This cause having heretofore been tried before the court upon the merits, and by the court taken under advisement, and the court being now fully advised in the premises, finds the issues herein joined in favor of the plaintiff; and thereupon,

It is ordered by the court that the judgment ordered pre-
76 pared in accordance with such finding, be signed and recorded in the Judgment Book.

And thereupon, and on, to-wit, on the 18th day of January, A. D. 1904, the same being one of the regular juridical days of the January Term 1904 of said court, the following proceedings *inter alia* were had and entered of record in the Judgment Book of said court, to-wit:

THE PEOPLE OF THE STATE OF COLORADO, on the Relation of HENRY A. LINDSLEY, District Attorney for the Second Judicial District of the State of Colorado,
vs.
AMERICAN SMELTING AND REFINING COMPANY, a Corporation.

This matter having come on further to be heard this 18th day of January, A. D. 1904, before the Honorable District Court, Third division of the City and County of Denver, aforesaid, formerly a part of the County of Arapahoe, and plaintiff being present by N. C. Miller, Attorney General, and respondent American Smelting and Re-

cott, Vaile & Waterman, and the court being fully advised in the premises, after having taken said matter under advisement,
77 doth find all material allegations of the complaint or petition in favor of the plaintiff, and doth find specially,

First: That there is due from said respondent, and payable to the Auditor of State of the State of Colorado for the use of said State, on or before the first day of May, A. D. 1902, an annual State corporation license tax of four thousand dollars ($4,000) and that the same is now still due and unpaid.

Second. That on to-wit, the 29th day of May, A. D. 1902, the Auditor of State of the State of Colorado, within the time required by said Act, notified in writing the said respondent, that by failure to comply with the requirements of said Act, it had forfeited its right to do business within the State of Colorado and further advised said respondent how it could be relieved from said forfeiture, and that it is further found that respondent has not paid said tax, although notified as aforesaid.

Third. That the said tax, which respondent has failed, neglected and refused to pay, is for the year ending May 1st, A. D. 1902.

Fourth. That said respondent still continues to exercise the powers, privileges and franchises of a corporation within the limits of the State of Colorado, without warrant of law.

Fifth. It is further found that said corporation is organ-
78 ized under the laws of the State of New Jersey, and does business in the State of Colorado as a foreign corporation; but that it has complied with all the laws of the State of Colorado demanded of foreign corporations, except Sections 64 to 69, inclusive, of the Revenue Act of 1902, entitled, "An Act in relation to public revenue, and repealing all previous acts or parts of Acts in conflict therewith," approved March 22, 1902, but that it has failed, neglected and refused to comply with any or all of said last named sections.

Wherefore, it is considered by the court, that the respondent American Smelting and Refining Company, a corporation, has forfeited its right to do business within the limits of the State of Colorado, until such tax is paid, and it is absolutely and wholly deprived of all rights and privileges within the State of Colorado until such tax is paid.

It is further ordered, that plaintiff shall have and recover of the respondent, its costs in this behalf incurred, taxed at the sum of $— and hereof let execution issue.

S. L. CARPENTER, *Judge.*

And thereupon, and on, to-wit, the same day (the 18th day of January, 1904,), the following proceedings *inter alia* were had and entered of record in said court, to-wit:

35293.

79 THE PEOPLE OF THE STATE OF COLORADO *ex Rel.* HENRY A. LINDSLEY, ETC.,

vs.

THE AMERICAN SMELTING AND REFINING COMPANY, ETC.

At this day comes the said defendant by its attorneys and prays an appeal to the Supreme Court of the State of Colorado, which is allowed upon condition that it file herein within ten days from this day its appeal bond in the penal sum of five hundred ($500) dollars, with sureties to be approved by the clerk of this court.

And time and until sixty days from this day is allowed said defendant within which to prepare and tender to the Judge of this Court its Bill of Exceptions by it reserved herein, which when signed and sealed by the said judge shall be filed herein as of this day.

And afterwards, and on, to-wit, the 21st day of January, A. D. 1904, came the respondent by its attorneys, and filed herein its Appeal Bond, to-wit:

Know all men by these presents, That we, American Smelting and Refining Company, a corporation organized and existing under the laws of the State of New Jersey and Dennis Sheedy and Franklin Guiterman, General Manager, of the City and County of Denver, and State of Colorado, are held and firmly bound unto The
80 People of the State of Colorado in the penal sum of five hundred (500.00) no/100 dollars, lawful money of the United States, to be paid to the above named obligee for the payment of which, well and truly to be made, we bind ourselves, our successors, heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, this 21st day of January in the year of our Lord one thousand nine hundred and four (1904).

Whereas, the said The People of the State of Colorado did, on the 18th day of January, A. D. 1904, at a term of the District court then being holden within and for the City and County of Denver and State of Colorado, obtain judgment against the above bounden, American Smelting and Refining Company, for the costs of suit to be taxed, from which judgment the said American Smelting and Refining Company has prayed for, obtained and taken an appeal to the Supreme court of said State.

Now the condition of the above obligation is such, that if the said American Smelting and Refining Company shall duly prosecute the said appeal and shall pay and satisfy the judgment, costs, interest and damages, in case the judgment shall be affirmed by the Supreme court whether judgment shall be given by the Supreme court
81 or by the said District court, then this obligation to be null and void, otherwise to remain in full force and virtue.

AMERICAN SM. & REF. CO., [SEAL.]
FRANKLIN GUITERMAN, *Gen. Mgr.*
DENNIS SHEEDY. [SEAL.]

STATE OF COLORADO, *City and County of Denver, ss:*

Dennis Sheedy, being first duly sworn, upon his oath says that he is one of the sureties on the within bond, that he is a resident of the City and County of Denver, State of Colorado, and that he is worth, and seized and possessed in his own right, over and above all his just debts and liabilities, in property not exempt by law from levy and sale upon execution, of a clear, unincumbered estate of the value of one thousand (1,000) dollars within the jurisdiction of this State.

DENNIS SHEEDY.

Subscribed and sworn to before me this 21st day of January, A D. 189—.

My commission expires March 31st, 1907.

J. AUGUSTIN GALLAHER,
[SEAL.] *Notary Public.*

(Endorsed:) No. 35293. District Court of City and
82 County of Denver. The People of the State of Colorado *ex rel. vs.* American Smelting & Refining Company. Appeal bond. Approved and filed this 21st day of January, A. D. 1904. Otis B. Spencer, Clerk, by J. S. Brown, Deputy.

STATE OF COLORADO, *City and County of Denver, ss:*

I, Otis B. Spencer, clerk of the District court in and for the City and County of Denver, State aforesaid, do hereby certify the above and foregoing to be a true, complete and perfect transcript and copy of Complaint, Demurrer, Answer, Reply Appeal Bond and Orders of Court had and entered of record in a certain cause in said court lately depending, wherein The People of the State of Colorado *ex rel.*, etc., were plaintiff, and American Smelting & Refining Company was respondent, as the same now remain on file and of record in said court.

And I further certify the accompanying Deposition and Bill of Exceptions to be the Original Deposition and Bill of Exceptions filed in said cause.

Witness my hand and seal of said court at the Court House in Denver, County and State aforesaid, this 24th day of February, A. D. 1904.

[SEAL.] OTIS B. SPENCER, *Clerk.*

83 STATE OF COLORADO, *City and County of Denver, ss:*

In the District Court.

No. 35293.

THE PEOPLE OF THE STATE OF COLORADO *ex Rel.* HARRY A. LINDSLEY, District Attorney, Plaintiff,

vs.

AMERICAN SMELTING AND REFINING COMPANY, a Corporation, Respondent.

Stipulation.

It is hereby stipulated and agreed, by and between the plaintiff and the respondent, by their respective counsel of record, that the attached deposition of Franklin Guiterman, taken on the 30th day of November, A. D. 1903, before Grace B. Lindsley, a notary public, and certified by her, as such notary public, on the first day of December, 1903, may be read in evidence upon the trial of the above entitled cause, with the same force and effect as though regularly taken in accordance with the statutes in such case made and provided; and, further, with the same force and effect as if given orally upon the witness stand upon the trial of said cause, by the said witness Franklin Guiterman.

Dated Denver, Colo., Dec. 1st, 1903.

N. C. MILLER, *Attorney for Plaintiff.*
WOLCOTT, VAILE AND WATERMAN,
Attorneys for Respondent.

84 STATE OF COLORADO, *County and City of Denver, ss:*

In the District Court.

No. 35293.

THE PEOPLE OF THE STATE OF COLORADO on the Relation of HENRY A. LINDSLEY, District Attorney for the Second Judicial District of the State of Colorado, plaintiff,

vs.

AMERICAN SMELTING AND REFINING COMPANY, a Corporation, Respondent.

Deposition of Franklin Guiterman on Behalf of Respondent.

Be it remembered, That on the 30th day of November, A. D. 1903, at the hour of eleven o'clock a. m., in pursuance of a stipulation hereto attached, the parties to the above entitled cause appeared before me, Grace P. Lindsley, a Notary Public in a- for the City and County of Denver, in the State aforesaid, at Room 419 Equitable

Building, in said City, the plaintiff in said cause being represented by Mr. N. C. Miller, Attorney General, and the respondent in said cause being represented by Mr. C. W. Waterman, its attorney. And on this day came also before me Franklin Guiterman, of lawful age, to testify and the truth to say as a witness on the part and behalf of the *the* respondent in the suit and matter in controversy
85 above mentioned and now pending and undetermined in said court. And the said witness having been by me first duly sworn according to law respectively to testify to the truth, the whole truth and nothing but the truth in the matter and suit in controversy aforesaid, was examined by oral interrogatories propounded to him by counsel, as in his deposition following appears:

FRANKLIN GUITERMAN, a witness produced on the part of the respondent, being first duly sworn, in answer to interrogatories propounded to him, testified as follows:

Direct examination by Mr. WATERMAN:

Q. You may state your full name.
A. Franklin Guiterman.
Q. Where do you reside?
A. Denver.
Q. Are you in any way connected with the respondent, the American Smelting and Refining Company?
A. I am employed by the respondent.
Q. In what capacity?
A. General manager of the Colorado department.
Q. Are you familiar with the business of the respondent company?
A. I am.
Q. The respondent company began doing business in this State in the year 1899, did it not?
A. Yes, sir.

Q. What is the business of the respondent company?
86 A. The business of smelting ores, and refining the metals obtained therefrom.

Q. How many plants has it in Colorado?
A. It now has seven in Colorado. That is the number left after having dismantled several.
Q. Does the respondent company purchase the ores which it smelts, or does it smelt them and reduce them for individuals for hire?
A. It purchases outright the ores which it smelts.
Q. From what source do the ores which the respondent company purchases and treats in its Colorado plants come?
A. Partly from Colorado, and partly from other States and Territories.
Q. Will you name some of the States and Territories that those ores come from?
A. Utah, Idaho, Montana, California, Arizona, New Mexico, South America and Old Mexico. I think I have named them all.

Q. How about British Columbia?
A. British Columbia; yes.
Q. How about the Dakotas?
A. The Dakotas; yes—that is, South Dakota.
Q. Does your company purchase ores in States, Territories and countries other than the State of Colorado which are to be delivered to the respondent company by the sellers at the respondent company's plants in the State of Colorado?
A. Yes, sir; it does.

87 Q. Are such ores so purchased and contracted to be delivered, as referred to in my question, purchased and received by the respondent company at its plants in Colorado?

A. In a large part, foreign ores are purchased in foreign Territories through local agencies, for which the cash is paid, and the transaction is completed there. The ores are then shipped to Colorado by such agencies, on bill of lading with draft attached.
Q. But you do also contract for ores in other States, Territories and countries outside of Colorado, whereby the contracts calls for the delivery of the ores so purchased at your plants in Colorado?
A. Yes, sir; to a considerable extent.
Q. What portion of the ores purchased by your company and treated at its plants in Colorado come from States, Territories and countries outside of Colorado?
A. Well, I should say, roughly speaking, about forty per cent., perhaps.
Q. State whether or not ores containing valuable metals are shipped to the respondent company from points outside of the State of Colorado consigned to the respondent company, which, upon being received by the company at its plants in Colorado, are sampled and the value ascertained and paid for on that basis?
A. Yes; there are such ores.
Q. From what sources do they come?
A. They come from the same States and Territories that I have named.

88 Q. Are there any other methods by which you purchase ores at points outside of the State of Colorado and receive them and smelt them in Colorado than those which you have testified to already?

A. There are not.
Q. The ores which your company purchases outside of the State of Colorado and receives at its plants in Colorado, as you have stated—what is done with them by the respondent company?
A. They are smelted and the metals are extracted and converted into the form of what is termed base bullion and blister copper, and those baser products are then sent east to our refineries for the separation of the respective metals from one another.
Q. Then what is done with them?
A. Then they are sold on the market by our company.
Q. In Colorado, or outside?
A. Outside of Colorado.
Q. Do you sell any of the metals so extracted by the Colorado plants, in Colorado?

A. We do not.

Q. How long has the respondent company been carrying on the business of purchasing ores outside of the State in the way you have testified, smelting them in this State, as you have testified, and shipping the bullion, as you have testified, to points outside of the State, and there refining the same and selling the same?

89 A. Since the organization of the company.

Q. In the year 1899?

A. Yes, sir.

Q. And is it still going on?

A. Yes, sir.

Q. Does the American Smelting and Refining Company own property outside of the State of Colorado in the nature of smelting plants?

A. It does.

Q. What other kinds of property does it own?

A. It owns mining property in addition to smelting property.

Q. Can you approximate the proportion of the entire property of the respondent company which lies inside the State of Colorado?

A. Of course, I could not answer as to the next details, but, roughly speaking, the proportion of the Colorado property to the whole property of the company would lie somewhere between 10 and 20 per cent. of the whole, I think.

Q. Not less than ten, nor more than twenty?

A. No, not more than twenty.

Q. Can you approximate, from your familiarity with the property of the company, and plants in this State, the value of such property in this State?

A. You mean the value of the smelting property in this State?

Q. The smelting property in this State.

A. Well, if we were to reconstruct the plants which we are operating, I should say that the value might be close to $5,000,000.

90 Q. Then I understand you to say, Mr. Guiterman, that the respondent company purchases ores in other States, Territories and countries than the State of Colorado, pays for them at the points of purchase, ships them to its smelting plants in the State of Colorado, and there smelts them?

A. Yes; it pays for them at the points of purchase in a very large measure. There are some exceptions to the rule, where the ores are shipped and sampled here and purchased on receipt. Where we have agencies, such as is the case in Idaho, such as is the case in Utah, such as is the case in South America, such as is the case in Mexico, the ores are paid for at the point of shipment and shipped to us.

Q. Then there are other ores coming from points outside the State of Colorado consigned to your company, which are purchased there, and consigned, and to be delivered, to your company in Colorado?

A. Yes, sir.

Q. And in other cases ores are consigned by the owners from points outside of the State of Colorado to the Smelting plants of the

company in Colorado, and when received are sampled and the value ascertained, and the value transmitted?

A. Yes, sir.

Cross-examination by Gen. MILLER:

Q. I understand, then, Mr. Guiterman, that there are just two methods by which you obtain ores outside of Colorado; one is by the local agency existing in some of those States and Territories, and foreign countries, determining the value of the ores in
91 those States, Territories and foreign countries, and it is paid for by shipping it to these plants in Colorado with bill of lading attached, and paid for upon arrival here, isn't it?

A. Yes, sir.

Q. Now, you have no means of transportation of that ore from those points to your smelters here?

A. It is foreign transportation, that is, by foreign companies.

Q. That is done by foreign corporations that you have no interest in or control over at all?

A. Exactly.

Q. And the shipment is from the foreign country wherever the mine is?

A. Yes, sir.

Q. To the plant in Colorado, and the bill of lading ends there?

A. It is either from the mine, General, or else from the sampling works in which the ore is sampled and then transmitted to the smelter, and value determined. If we settle there for it the value has to be determined by the same method of sampling that is used here; and draft is usually attached to the bill of lading.

Q. And the destination of it is either the Denver smelter, or some other smelting plant in Colorado?

A. Denver or Leadville, or Pueblo.

Q. After it is treated at the point in Colorado it is re-shipped under a different bill of lading, made out in the name of a different owner?

A. No—that is, you refer to the ore?

Q. No; after it is treated?

92 A. After the ore is treated the result, the product of that treatment, is base bullion or blister copper, which carries respectively gold, silver and lead, or copper, silver and gold; and those products are billed out by us to our refineries for further metallurgical treatment.

Q. The consignor of this base bullion is the American Smelting and Refining Company?

A. Oh, yes; at some other point.

Q. But the bill of lading from these foreign countries and States to a Colorado smelter is in the name of the owner of the ore to the American Smelting and Refining Company?

A. Yes; if the owner of the ore has shipped it and drawn on the bill of lading, it is shipped by him to us.

Q. It would necessarily be so if the bill of lading was attached, wouldn't it?

A. Yes, sir.

Q. It would be shipped in the name of the seller of the ore to the American Smelting and Refining Company?

A. Of the seller of the ore to the American Smelting and Refining Company.

Q. And as I understand, in all these cases the value is determined where the mine is—at least, in the country where the mine is?

A. Not always. It depends upon the arrangement. In the great majority of cases of foreign shipments the value is determined at the point of shipment. But in other cases it is determined here on arrival.

93 Q. Am I correct in the understanding that ores are shipped to the Colorado smelters from South America?

A. Yes, sir.

Q. British Columbia and Old Mexico?

A. Yes, sir.

Q. And several of the States which you have mentioned, and Territories?

A. Yes, sir; that is right.

Q. And I also understand you that from some of the States the owners of the ore ship direct to the smelters?

A. They do.

Q. And you determine the value as the smelters?

A. Yes, sir.

Q. And then pay for it there?

A. Pay for it here.

Q. Pay for it here at the smelter. In that case the value of the ore is determined at the smelters in Colorado?

A. Yes, sir.

Q. You have also mines in Colorado, besides smelters, havn't you?

A. No, sir; we have no mines in Colorado. We have mines in Mexico; but I am not aware——

Q. The mines which the Guggenheims bought in the San Juan country, were they not purchased in the name of the American Smelting and Refining Company?

A. Those mines are in the name of the Guggenheim Exploration Company; that has nothing to do with the American Smelting and Refining Company whatever.

Q. They own no such property in the State of Colorado?

94 A. Not to my knowledge.

Q. You have no interstate railroads which are connected with the carrying on of the American Smelting and Refining Company's business?

A. No, sir; no railroads.

Q. You depend entirely upon common carriers which are owned by other corporations than this respondent corporation?

A. We don't depend entirely upon them, no. We have a steamship line in the east which does business between our eastern refinery at Perth Amboy, New Jersey, and Mexico. We own our own steamship line.

Q. Carrying ores between Old Mexico and where?

A. And Perth Amboy, New Jersey.

Q. But none connected with Colorado?
A. Not at all, no.
Q. Is that steamship line owned by the American Smelting and Refining Company?
A. I so understand it.
Q. Or is it a separate corporation?
A. I understand it is owned by the company.

Redirect examination by Mr. WATERMAN:

Q. Referring to these ores which you say are purchased by the respondent company outside of the State of Colorado to be delivered by the seller in Colorado at the respondent company's plant, when they are received and the value ascertained, from the value so ascertained do you deduct the smelting charge and the
95 transportation charges?
A. Yes, indeed.
Q. And the balance, after such reduction, is remitted to the seller?
A. It is; yes, sir.
Q. Mr. Guiterman, since the respondent company began to do business in this State in the year 1899, down to the present time, how many tons of ore per month, on *on* average, during that time, have been treated and smelted by the respondent company at its smelting plants in the State of Colorado?
A. Approximately, 100,000 tons per month.

Recross-examination by Gen. MILLER:

Q. Your answer to the next to the last re-direct question of Mr. Waterman's relates to the ores that you buy at the mine in other States and countries?
A. It relates to all ores, General. The ores which we buy are subject to two payments to us; the deduction of the freight charge, and the deduction of the treatment charge. There is an exception to that sometimes; when we buy right on board the cars we always take off a certain amount for freight and treatment.
Q. If the owner, being a man in Idaho, ships you ore to the smelter in Colorado, you receiving it here and determining its value, and buying it in Colorado, do you pay the freight?
A. No, sir; we never pay the freight.
96 Q. But if you buy that ore yourself in Idaho?
A. I beg your pardon. I would like to modify that answer, if you please. Where we buy or contract for ore and pay the shipper so much money less freight and treatment charges, on board cars, then we pay the freight. Where we buy the ore delivered at the smelter we pay the freight also, and deduct it from him. In any event we pay the freight. We have our freight dealings with the railroads, and the shipper never pays the freight. We always pay the freight, deducting the freight tariff from the ore in settlement for the same. Do I make myself clear?
Q. Yes, I understand you.
By Mr. WATERMAN: But ultimately the shipper or owner or seller pays the freight?

A. The shipper or owner always pays the freight. We pay the freight in the sense that we simply advance the freight money on his behalf. That is what it amounts to.

By Gen. MILLER: Well, you have a general arrangement with the railroads, and you pay it and give the shipper the advantage of it?

A. No; we have to do that if the shipper doesn't prepay the freight; but we pay the freight for him, and the expense bill and everything else is shown to the shipper so that he sees what we pay to the railroad.

Q. You take it out and pay him the net amount?

97 A. We simply put ourselves in the position of advancing the freight money for him. He pays the freight always, practically. We don't pay it.

Q. It comes out of the value of the ore?

A. It comes out of the value of the ore. For instance, if the value of the ore, which happens sometimes, does not cover the freight and treatment charges, we transmit him a bill so that he has to make the difference good to us.

Q. You have agents that you employ, and you send them all over the country looking for ores for your smelters and buying them and having them consigned to your smelters here in Colorado, don't you?

A. No, I can't say that we do, General. We have local agents at points; but, for instance, in Idaho our agent is our Idaho client, and in Idaho we had a sampling works at one time.

Q. That is your agent there?

A. That would be our agent there. And here in Colorado we have a general purchasing agent who deals with the shippers, but in the sense of the term of having men going all around the country to buy ore, we haven't them.

Q. Not in the sense of traveling agents?

A. Not any traveling agents, no, sir.

Q. How is it with your local plants?

A. For instance, in Leadville we have a local man there.

Q. Well, that is in the State of Colorado; but when you buy ore in California you have a local plant there?

98 A. No. Either the party has to do his business through our local plant in each State or Territory or else he has to ship ore under the conditions which have been named by me. In California we have not any agent. In Idaho there are certain parties there that act as agents for us who are in mining camps, bankers there, through whom we transact business. They draw on us sometimes for money, advances and one thing and another, but we have not any traveling agents.

Q. But where you have not a local plant in the State outside of Colorado, they must necessarily ship it here to have its value determined?

A. They do; that is the practice as I have mentioned.

Q. But where you have a local plant, its value is determined in the State or Territory?

A. Not always. According to whether it is feasible or not. Sometimes it might cost them more, you see, to send it around to where we

could determine the value there, than if they shipped here direct. If they can avoid that cost and expense, shipping it direct, they do so. In this ore business we govern it entirely for the benefit of the shipper. We conduct our business so that the shipper gets the benefit of it.

Q. In any event when it is received and accepted by you at the plant, it becomes your ore?

A. Yes, sir; it is our ore.

Q. And treated by you as your ore after that time?

99 A. Yes, sir; it is our ore. We purchase it outright and the shipper pays the transportation cost and everything.

Q. But you have several plants in other States and Territories outside of Colorado?

A. Yes, sir; in fact the greater part, far the greater part, of our business is done outside.

FRANKLIN GUITERMAN.

STATE OF COLORADO, *City and County of Denver ss:*

I, Grace P. Lindsley, a Notary Public in and for the City, County and State aforesaid, do hereby certify that, on the day mentioned in the foregoing proceedings and deposition, I was attended by the counsel and witness aforesaid at room 419 Equitable Building, Denver, Colorado; that said witness, to-wit, Franklin Guiterman, was first duly sworn by me according to law as a witness in the suit or cause in the caption hereto mentioned, and there examined by counsel, and by the consent of the parties, by their several said attorneys, the examination of said witness was stenographically written down and afterwards typewritten; that such examination was had in the presence of the attorneys of the several parties hereto and that said deposition, after being completed and typewritten, was read over by the witness deposing the same and corrected, and was duly signed by said witness so making and signing the same, all in my

100 presence.

I further certify that the foregoing is a true statement of all the proceedings had before me in the matter of the taking of testimony herein.

I further certify that I am not related to or in any way connected with either of the parties to this suit.

I further certify that the fee for taking this deposition has been paid to me by Messrs. Wolcott, Vaile & Waterman, attorneys for respondent.

In witness whereof, I hereunto set my hand and notarial seal this 1st day of December, A. D. 1903.

[NOTARY SEAL.] GRACE P. LINDSLEY,
Notary Public.

My commission expires February 28, 1907.

STATE OF COLORADO, *City and County of Denver, ss:*

In the District Court of the Second Judicial District of the State of Colorado, sitting within and for the City and County of Denver.

No. 35293.

THE PEOPLE OF THE STATE OF COLORADO on the Relation of HENRY A. LINDSLEY, District Attorney for the Second Judicial
101 District of the State of Colorado, Plaintiff,

vs.

AMERICAN SMELTING AND REFINING COMPANY, a Corporation, Respondent.

Defendant's Bill of Exceptions.

Appearances.

For the Plaintiff: N. C. Miller, Att'y Gen., and H. J. Hersey.
For the Defendant: Wolcott, Vaile & Waterman.

Be it remembered, that heretofore and on, to-wit: the day of 3rd of March, A. D. 1903, the respondent in the above entitled cause, filed therein in said District Court its demurrer to the complaint or information, which demurrer is of record in said cause; that thereafter, and, to-wit: on the 24th day of June, A. D. 1903, the said demurrer came on for argument before the court, and was argued by counsel for the respective parties, and was thereafter by the court overruled and denied, to which ruling of the court in overruling and denying the said demurrer, the respondent, then and there by its counsel duly excepted.

Thereafter, the respondent, American Smelting and Refining Company, filed in said cause its answer to the said com-
102 plaint or information, which is of record in said cause, and thereafter the plaintiff, the People of the State of Colorado, on the relation of Henry A. Lindsley, District attorney for the second Judicial District of the State of Colorado, filed a reply to the respondent's said answer, which reply is of record in said cause.

That thereafter, and on, to-wit, the 7th day of December, A. D. 1903, at the September Term of said District court, the said cause came on for trial before the Honorable Samuel L. Carpenter, judge of said court, without a jury, and the following proceedings were had, that is to say:

The plaintiff withdrew the demurrer contained in the said reply to the respondent's said answer, but without prejudice, however.

Thereupon, the plaintiff objected to the introduction of any testimony on the part of the respondent, on the ground that the respondent's answer did not state facts sufficient to constitute a defense to the complaint or information, which objection of the plaintiff was by the court overruled. Exception taken.

Thereupon, the respondent offered in evidence the certain deposi-

tion of Franklin Guiterman, taken on behalf of the respondent, which said deposition was and is of record and on file in said cause.

And thereupon, there being no objection to the said deposition the respondent read the said deposition of the said Franklin
103 Guiterman to the court, which said deposition of the said Franklin Guiterman so on file and of record, as aforesaid, is hereby made a part of the record and proceedings in said cause, and is on file and of record therein.

Thereupon, C. W. WATERMAN, a witness for the respondent, was called, and being first duly sworn, testified as follows:

As is shown by the pleadings in this case, the company was organized early in the year 1899. When it came to transact business in the State of Colorado, and to purchase property in the State of Colorado, the transaction of that business, so far as the legal aspect of it was concerned, fell to the hands of Mr. Joel F. Vaile and myself. I was probably in most of the transactions more closely connected than was Mr. Vaile. At that time we took the position and advised that no property should be purchased in this State until the respondent company had conformed with every law and statute in the State relating to the doing of business in the State by a foreign corporation. Certain things were done in that behalf either by Mr. Vaile or by myself, and all those matters appear in the pleadings and are admitted.

As soon as these things were done, the filing of the articles and the statutes of New Jersey and the certificates referred to in the pleadings on behalf of the respondent, we took up the examination of the titles to the several smelting plants of the State. There were two
104 in Denver, the Globe and the Grant; there were two at Pueblo, and there were three at Leadville, which were purchased immediately after the company had qualified itself to do business in this State, the title to the property being taken by the Smelting Company, the respondent, direct. In one or two other instances the company took the plants by purchasing the stock of the companies which owned them. None of these plants were purchased, nor was any property purchased by the Smelting Company until it had done the things in connection with its right to do business in this State, as shown by the pleadings. And counsel advised at that time that nothing of that kind should be done until the respondent had conformed to the laws of this State so that the respondent was enabled to do business in this State under its laws, and when it had conformed with those laws it could then safely proceed to buy property and to transact its business in this State.

Thereupon the plaintiff moved to strike out the testimony of C. W. Waterman, as being immaterial, incompetent and irrelevant, which motion was by the court then and there overruled. Exception taken.

Thereupon, the respondent, by its counsel, asked leave to amend its answer by inserting after the words on page 20 of said answer, to-wit: "Par value of less than one dollar ($1.00) per share,"
105 the following words, to-wit: "And is arbitrarily assessed without any regard to the value of the shares of stock upon which

There being no objection, it was ordered by the court that the respondent have leave to make the said amendment by interlineation, which was accordingly done.

And thereupon the cause was argued by counsel before the court, and the cause was by the court taken under advisement; and thereafter, and on, to-wit, the 18th day of January, 1904, the court made its findings in said cause in favor of the plaintiff and against the respondent, and did render and enter of record its judgment in said cause in favor of the plaintiff and against the respondent, which said findings and judgment were and are in the words and figures as follows, to-wit:

Be it remembered that heretofore and on, to-wit, the 18th day of January, A. D. 1904, the same being one of the regular juridical days of the January Term A. D. 1904 of said court, the following proceedings *inter alia* were had and entered of record in said court, to-wit:

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THE PEOPLE OF THE STATE OF COLORADO *ex Rel.* HENRY A. LINDSLEY, ETC.,

vs.

THE AMERICAN SMELTING AND REFINING COMPANY, ETC.

106 This cause having heretofore been tried before the court upon the merits, and by the court taken under advisement and the court being now fully advised in the premises, finds the issues herein joined, in favor of the plaintiff, and thereupon,

It is ordered by the court, that the judgment ordered prepared in accordance with such finding be signed and recorded in the Judgment Book.

Be it remembered that heretofore and on, to-wit, the 18th day of January, A. D. 1904, the same being one of the regular juridical days of the January Term 1904 of said court, the following proceedings *inter alia* were had and entered of record in the Judgment Book of said court, to-wit:

35293.

THE PEOPLE OF THE STATE OF COLORADO on the Relation of HENRY A. LINDSLEY, District Attorney for the Second Judicial District of the State of Colorado,

vs.

AMERICAN SMELTING AND REFINING COMPANY, a Corporation.

This matter having come on further to be heard this 18th day of January, A. D. 1904, before the Honorable District Court, Third Division, of the City and County of Denver, aforesaid, for-
107 merly a part of the County of Arapahoe, and plaintiff being present by N. C. Miller, Attorney General, and respondent,

American Smelting and Refining Company, a corporation, being present by its attorneys, Wolcott, Vaile & Waterman, and the court being fully advised in the premises, after having taken said matter under advisement, doth find all material allegations of the complaint or petition in favor of the plaintiff, and doth find specially,

First. That there is due from said respondent, and payable to the Auditor of State of the State of Colorado, for the use of said State, on or before the first day of May, A. D. 1902, an annual State corporation license tax of four thousand dollars ($4,000) and that the same is now still due and unpaid.

Second. That on, to-wit, the 29th day of May, A. D. 1902, the Auditor of State of the State of Colorado, within the time required by said Act, notified in writing the said respondent, that by failure to comply with the requirements of said Act, it had forfeited its right to do business within the State of Colorado, and further advised said respondent how it could be relieved from said forfeiture, and that it is further found that respondent has not paid said tax, although notified as aforesaid.

Third. That the said tax, which respondent has failed, neglected and refused to pay, is for the year ending May 1st, A. D. 1902.

108 Fourth. That said respondent still continues to exercise the powers, privileges and franchises of a corporation within the limits of the State of Colorado, without warrant of law.

Fifth. It is further found that said corporation is organized under the laws of the State of New Jersey, and does business in the State of Colorado as a foreign corporation; but that it has complied with all the laws of the State of Colorado demanded of foreign corporations, except Sections 64 to 69, inclusive, of the Revenue Act of 1902, entitled "An Act in relation to public revenue, and repealing all previous Act or parts of Acts in conflict therewith" approved March 22, 1902, but that it has failed, neglected and refused to comply with any or all said last named sections.

Wherefore it is considered by the court, that the respondent, American Smelting and Refining Company, a corporation, has forfeited its right to do business within the limits of the State of Colorado, until such tax is paid, and it is absolutely and wholly deprived of all rights and privileges within the State of Colorado until such tax is paid.

It is further ordered, that the plaintiff shall have and recover of the respondent, its costs in this behalf incurred, taxed at the sum of $— and hereof let execution issue.

S. L. CARPENTER, *Judge.*

109 And foregoing contains all the evidence and testimony offered, given or received upon the trial of said cause.

To which findings, both general and special, and to each of them separately, so made by the court, the respondent then and there by its counsel duly excepted; and particularly to the first and fourth special findings.

To which judgment of the court the respondent then and there by its counsel duly excepted, and separately excepted to each of the three

To the entry of which said judgment of record, the respondent then and there by its counsel duly excepted.

And thereupon the respondent prayed an appeal from the said judgment to the Supreme Court of the State of Colorado, which was by the court allowed, upon condition that the respondent file in said cause its appeal bond for costs in the penal sum of five hundred dollars ($500.00) within ten (10) days from the said 14th day of January, A. D. 1904.

And thereupon on motion of the respondent, the respondent was allowed and given, by order of the court, sixty (60) days from and after the 14th day of January, A. D. 1904, within which to prepare and tender its bill of exceptions by it reserved upon the trial of said cause, which, when so authenticated, shall be and become a part of the record in said cause.

110 Thereafter and on, to-wit: the 21st day of January, A. D. 1904, the respondent filed in said cause its appeal bond for costs in the sum of five hundred dollars ($500.00), which said appeal bond was duly approved in compliance with the order of the court.

And for as much as the matters, proceedings and things hereinbefore set out do not fully appear in the record proper, the said defendant hath prepared and presented the foregoing bill of exceptions, and prays that the same may be allowed, signed, sealed and made a part of the record herein, which is accordingly done this 11th day of February, 1904.

SAMUEL L. CARPENTER, [SEAL.]
District Judge.

111 *Assignments of Error.*

Comes now the said appellant, by Messrs. Wolcott, Vaile and Waterman, its attorneys, and humbly showeth to the Court that manifest manifold and grievous errors were committed to its prejudice by the court below in the proceedings, rulings and trial of this cause, and especially in the following particulars, to-wit:

1. The court below erred in overruling the demurrer to the complaint herein. (Fol. 24-38, 44, 231.)

2. The findings of the court below herein were erroneous and unsupported by the law or the evidence. (Fol. 187-90, 239, 241-3, 244.)

3. The court below erred in finding the issues herein joined in favor of the plaintiff. (Fol. 239.)

4. The court below erred in finding "all the material allegations of the complaint or petition in favor of the plaintiff." (Fol. 241.)

5. The court below erred in making the following special finding, to-wit: "First. That there is due from the respondent and payable to the Auditor of State of the State of Colorado, for the use of said State, on and before the first day of May, A. D. 1902, an annual

112 State corporation license tax of four thousand dollars ($4,000), and that the same is now still due and unpaid." (Fol. 241.)

6. The court below erred in making the "second" and "third" special findings, since the same and each of them are immaterial and

irrelevant, because predicated upon Sections 64 to 69 inclusive of the so-called "Act in relation to public revenues" approved March 22, 1902, and said so-called Act is without constitutionality, validity or operation in law. (Fol. 241-2.)

7. The court below erred in making the following special finding, to-wit: "Fourth: That said respondent still continues to exercise the powers, privileges and franchises of a corporation within the limits of the State of Colorado, without warrant of law." (Fol. 242.)

8. The "fifth" special finding of the court below is erroneous, in so far as it relates to or is in any manner predicated upon Sections 64 to 69 inclusive of a supposed "Act in relation to public revenues," approved March 22, 1902, since said so-called Act is void, invalid and wholly without operation or effect in law, because the power and method of taxation which said provisions attempt to authorize are in violation of the Colorado Constitution, and in excess of the amount of taxation as limited by said constitution, and also because the scope and powers of the legislature at the Special Session of 1902
113 were not such as to authorize or permit it to enact such statutory provisions. (Fol. 242-3.)

9. The court below erred in recognizing or giving any opreation to said Sections 64 to 69 inclusive, of the alleged act aforesaid, since said sections were not enacted under authortiy of law, and also since the subject matter of said provisions are contrary to, and in excess of the power conferred by the Colorado Constitution.

10. The judgment and decree of the court below is erroneous. (Fol. 190, 339, 343, 344.)

11. The court below erred in decreeing "that the respondent, American Smelting and Refining Company, has forfeited its right to do business within the limits of the State of Colorado, until such tax is paid." (Fol. 243.)

12. The court below erred in decreeing that said respondent "is absolutely and wholly deprived of all rights and privileges within the State of Colorado until such tax is paid." (Fol. 243.)

13. The court below erred in giving judgment against the appellant for costs, or in making and entering any judgment and decree herein against appellant. (Fol. 244.)

14. The court below erred in failing to find the issues joined herein in favor of the appellant, and in failing and refusing to enter
114 judgment in its favor as prayed for in its answer (Fol. 118.)

To all of which rulings, proceedings, findings and judgments, here complained of, the appellant reserved due, timely and separate exceptions.

Wherefore, the appellant respectfully prays that this judgment and decree may be reversed, and the cause remanded to the court below, with instructions from this court to dismiss herein, at the cost of the appellee (plaintiff below).

Respectfully submitted,

AMERICAN SMELTING & REFINING COMPANY,
By WOLCOTT, VAILE & WATERMAN,
Its Attorneys.

115 And afterwards and on to-wit the 5th day of May, A. D. 1904 the following Additional Assignment of Error, Motion for Leave to File same, and Notice, were filed in the Supreme Court, to-wit:

116 In the Supreme Court of the State of Colorado.

No. 4798.

AMERICAN SMELTING AND REFINING COMPANY, Appellant,
vs.
THE PEOPLE OF THE STATE OF COLORADO *ex Rel.*, etc., Appellee.

Appeal from the District Court of the City and County of Denver.

Additional Assignment of Error.

Comes now the said appellant, by Messrs. Wolcott, Vaile and Waterman, its attorneys, and by leave of Court first had and obtained, makes the following assignment of error, in addition to those heretofore made in this cause, to-wit:

15. The findings and judgment of the court below herein were erroneous and unsupported by the law or the evidence, because said sections 64 to 69 inclusive of the alleged act of March 22, 1902, were and are unconstitutional, null and void, because in violation of the Federal Constitution.

AMERICAN SMELTING AND
REFINING COMPANY,
By WOLCOTT, VAILE & WATERMAN,
Its Attorneys.

(F:C:5:4:04:)

117 In the Supreme Court of the State of Colorado.

No. 4798.

AMERICAN SMELTING AND REFINING COMPANY, Appellant,
vs.
THE PEOPLE OF THE STATE OF COLORADO *ex Rel.*, etc., Appellee.

Appeal from the District Court of the City and County of Denver.

Motion for Leave to File Additional Assignment of Error.

Comes now the said appellant, by Messrs. Wolcott, Vaile and Waterman, its attorneys, and respectfully prays leave to file in this cause the additional assignment of error hereto attached.

And for ground of said motion said appellant respectfully shows to the Court that the assignments of error as originally drawn were intended to present the proposition formulated in the proposed additional assignment, and in the opinion of its said attorneys are

still sufficient for that purpose; nevertheless, since some question of the sufficiency of the original assignments in this respect has been suggested, and to remove all possible doubt or controversy, that said proposition is presented to this Honorable Court as the record shows it was presented to the court below, the foregoing additional
118 assignment of error has been prepared and leave to file it is now prayed.

Respectfully submitted,

WOLCOTT, VAILE & WATERMAN,
Attorneys for Appellant.

(F:C:5:4:04:)

In the Supreme Court of the State of Colorado.

No. 4798.

AMERICAN SMELTING AND REFINING COMPANY, Appellant,
vs.
THE PEOPLE OF THE STATE OF COLORADO *ex Rel.*, etc., Appellee.

Appeal from the District Court of the City and County of Denver.

Notice.

To Honorable N. C. Hiller, Attorney General for the State of Colorado:

DEAR SIR: You are hereby notified that on the incoming of the Supreme Court on Thursday, May 5th, 1904, at 10 o'clock, A. M., we will apply for leave to file an additional assignment of error in the above entitled cause, a copy of which assignment, together with motion for leave to file the same, is hereto attached: when
119 and where you are notified to attend in this behalf if you so desire.

Very respectfully,

WOLCOTT, VAILE & WATERMAN,
Attorneys for Appellant.

No objection to your inserting it.

N. C. MILLER.

Received a copy of the above mentioned assignment of error, motion and notice at the City of Denver, this 4th day of May, A. D. 1904.

N. C. MILLER,
Attorney General.

(F:C:5:4:04:)

(Endorsed:) No. 4798. Colorado Supreme Court. American Smelting and Refining Company *vs.* The People of the State of Colorado, *ex Rel.*, etc. Additional Assignment of Error, Motion for Leave to File same and Notice. Filed in Supreme Court May 5, 1904. Horace G. Clark, Clerk.

120 And afterwards and on to-wit the 3rd day of July, A. D. 1905, the following further proceedings were had and entered of record, to-wit:

AMERICAN SMELTING AND REFINING COMPANY, Appellant,
vs.
THE PEOPLE OF THE STATE OF COLORADO *ex Rel.*, etc., Appellee.

Appeal from the District Court of the City and County of Denver.

At this day this cause coming on to be heard, as well upon the transcript of proceedings and judgment had in said District Court in and for the County of Denver as also upon the matters assigned for error herein; and the same having been heretofore argued by counsel and submitted to the consideration and judgment of the Court, and it appearing to the Court that there is no error in the proceedings and judgment aforesaid of said District Court, it is therefore considered and adjudged by the Court that the judgment aforesaid of said District Court be, and the same is hereby affirmed, and stand in full force and effect; and that this cause be remanded to said District Court for such other and further proceedings, according to law, as shall be necessary to the final execution of the judgment of said District Court in the cause, notwithstanding the said appeal.

It is further considered and adjudged by the Court that said appellee do have and recover of and from said appellant their costs in this behalf expended, to be taxed, and that they have execution therefor. And let the opinion of the Court filed herein be recorded.

121 Which said opinion is in words and figures as follows, to-wit:

No. 4798.

AMERICAN SMELTING AND REFINING COMPANY, Appellant,
v.
THE PEOPLE *ex Rel.* H. A. LINDSLEY, District Attorney, etc., Appellee.

Appeal from the District Court of the City and County of Denver.

This is a direct proceeding in the nature of *quo warranto* against the respondent company, prosecuted by the people, at the instance of the district attorney and the attorney general of the state, and having for its object the forfeiture of respondent's corporate franchises for its failure to pay the annual state corporation license tax, which the briefs designate "a flat tax." The findings were against respondent, and the decree declared forfeited its franchises, and forbade it longer to do business within the limits of this state until the tax is paid. Respondent brings the case here by appeal.

Only questions of law are in issue, and these are as to the meaning and validity of certain sections of our general revenue act, as applied

The respondent, appellant here, is a corporation organized under the laws of the state of New Jersey for the purpose of carrying on a general ore reduction, milling, sampling, smelting and mining business, and, as originally formed, had a capital stock of sixty five million dollars divided into shares of the par value of one hun-
122 dred dollars each. Our laws permit foreign corporations to enter into, and do business in, this state upon compliance with certain statutory conditions. In pursuance thereof, the appellant filed in the office of the secretary of state in 1899 a duly certified copy of its articles of incorporation. The statute then in force was that of 1897 (Session Laws 1897, p. 157), and it required a certain fee to be paid to the secretary of state, for the use of the state, upon the filing of the certificate, and it was expressly provided that such corporation should not have or exercise any corporate powers, or be permitted to do any business, in this state until the prescribed fee was paid. Thereafter appellant's original articles of incorporation were amended by increasing its capital stock to one hundred million dollars, and in pursuance of the statute of 1901, then in force (Session Laws 1901, p. 116), an additional fee, which all corporations must pay when their capital stock is increased, was by the appellant tendered to, and received by, the secretary of state, and thereupon that officer, as the statute provides, issued to appellant his certificate to the effect that appellant had complied with the laws of Colorado, which authorized it to exercise its corporate powers within this state, and entitled to hold property and carry on its business and enjoy its rights and franchises here during the period of its corporate existence. The two fees paid amount to $15,042.50.

In 1902 the general assembly passed "An Act in relation to Public Revenue" (Session Laws 1902, p. 32), sections 64, 65 and 66 of which are material to this case.

Section 64 lays on domestic corporations having a capital stock of twenty five thousand dollars or over, an annual state cor-
123 poration license tax of "Two cents upon each one thousand dollars of its capital stock."

Section 65 reads: "Every foreign corporation which has heretofore obtained, or which shall hereafter obtain, the right and privilege to transact and carry on business within the limits of the State of Colorado, shall, in addition to the fees and taxes now provided for by law, and as a condition precedent to its right to do any business within the limits of this state, pay annually, on or before the first day of May of each year, or at the time of obtaining such right or privilege, and on or before the first day of May of each year thereafter, as the case may be, to the auditor of the State of Colorado, a state license tax as follows:

"Four cents upon each one thousand dollars of its capital stock; Provided, That in cases of foreign corporations the par value of whose shares of stock is less than one dollar per share, they shall pay as such tax at the rate of two and one-half cents per thousand shares."

"SEC. 66. Every corporation which shall have failed to pay the tax provided for in sections 64 and 65, shall, by reason of such failure, forfeit its right to do business within the limits of this state until

such tax is paid, and shall be absolutely and wholly deprived of all such rights and privileges, and the fact of such failure may be pleaded and maintained as an absolute defense to any and all actions, suits or proceedings, in law or in equity, brought or maintained by or on behalf of such corporation, in any court of competent jurisdiction within the limits of this state, until such tax is paid."

124 Appellant refused to pay the state license tax imposed by section 65, and this proceeding was brought to forfeit its franchises for such failure. As justification for the refusal, and as grounds for the reversal of the judgment declaring the tax valid, appellant asserts that the sections of the act cited are in violation of several provisions of the state and federal constitution, to the consideration of which we presently address ourselves.

Mr. Justice CAMPBELL delivered the opinion of the court:

1. It will materially lessen our labors and shorten the opinion first to determine the nature of the burden imposed. If we find that it is a business or excise tax, that conclusion will answer some of the most serious objections urged. If it is a direct tax on property, the attorney general is disposed to concede that it would be repugnant to several clauses of our own constitution.

The language of section 65 is that every foreign corporation shall pay annually "a state license tax as follows: Four cents upon each one thousand dollars of its capital stock; Provided, That in cases of foreign corporations the par value of whose shares of stock is less than one dollar per share, they shall pay as such tax at the rate of two and one-half cents per thousand shares." The contention of appellant is that this is a direct tax upon capital stock, which is property, and, therefore, a property tax. The state says that, in the form of a license tax or excise, it is in reality a tax on the business of foreign corporations, and that the capital stock is merely taken as a convenient standard by which to estimate its amount.

125 "That the franchise, capital stock, business, and profits of all corporations are liable to taxation in the place where they do business, and by the State which creates them, admits of no dispute at this day." *State Railroad Tax Cases*. 92 U. S. 575, 603; *Parsons v. The People*, 32 Colo. 221 (76 Pac. Rep. 666, 670).

In *Louisville Tobacco Warehouse Co. v. Commonwealth of Ky.*, 57 L. R. A. 33, is found an elaborate note which throws much light upon this section. It is not always easy to determine whether a tax like that here laid is a franchise, excise, or business, tax, or a property tax. It has been said that the usual and most certain test is whether the tax is upon the capital stock *eo nomine*, without regard to its value, or whether based upon its assessed value. If the former, it is not, if the latter, it is, a tax upon property. Otherwise expressed, if a tax is imposed directly by the legislature without assessment, and its amount determined by the number of shares of stock, or amount of business done, or dividends declared, or some such standard, it is not usually considered a property tax; but where there is a precedent valuation of corporate property, and the levy of the tax is made upon such basis, it is usually considered a property tax.

We are clearly of the opinion that, though in form this tax is upon the capital stock, it is not a property tax, though the privilege of doing business is a property right. It is arbitrarily assessed by the legislature itself without reference to the value of the stock, or property, of the company. The capital stock is simply the standard, or measure, by which the total amount to be paid is computed, and the tax is not on the stock as property. This we think is fully
126 sustained by the authorities. *People v. Home Ins. Co.*, 93 N. Y. 328, 344; *Lumberville &c. Bridge Co. v. State Bd. of Assessors*, 25 L. R. A. 134 and notes; *State v. Stonewall Ins. Co.*, 89 Ala. 335; *Society for Savings v. Coite*, 6 Wall. 594; *Southern Gum Co. v. Laylin*, 64 N. E. (Ohio) 564, and other cases cited in the note referred to. We hold that the tax authorized by section 65, called a license tax, is, in form of an excise, a tax on the business of foreign corporations, and is levied for the purposes of state revenue. This conclusion is fortified by other sections of the same act which specifically provide for the ascertainment of the value of corporate franchises and their taxation as corporate property upon that value, and still other provisions for the assessment and taxation of their tangible property.

2. The foregoing necessarily disposes of, as untenable, the objection that this section violates the uniformity clause of section 3 of article 10 of the constitution. That provision is applicable only to a direct *ad valorem* tax on property, and not to a tax upon privileges or occupations.

Denver City Ry. Co. *v.* City of Denver, 21 Colo. 350;
Parsons *v.* The People, *supra.*

3. The contention that section 65 is invalid because the thing imposed is in the nature of a license under the police power, and not a tax under the sovereign power of taxation, and therefore not within the title of the act, which is "An Act in relation to Public Revenue," cannot be upheld. That which is levied here is not for regulation, nor is it traceable to the police power of the state, but finds its sanction in the taxing power, and, while called a state license tax, it is, as already decided, a business tax, laid for the purpose of pro-
127 curing revenue for state purposes, and, therefore, the provision is clearly within the title.

4. Section 6 of article 2 of our state constitution provides that "courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and that, right and justice should be administered without sale, denial or delay." And paragraph 1 of the 14th amendment of the federal constitution provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. Appellant says that section 65 contravenes these safeguards because a forfeiture of corporate franchises, for failure to pay a tax, is beyond the power of the legislature to declare, and only the courts, upon due notice and hearing, can so decree, and such a remedy impairs the obligation of its charter contract. And particularly obnoxious to its charter and con-

tion of the section, which declares that a failure of the corporation to pay the tax imposed, "may be pleaded and maintained as an absolute defense to any and all actions, suits or proceedings, in law or in equity, brought or maintained by or on behalf of such corporation in any court of competent jurisdiction within the limits of this state, until such tax is paid." As appellant is here called upon in court to justify its refusal to pay the tax, we fail to perceive the pertinency of the first objection. Besides, the forfeiture is merely a remedy for the due enforcement or collection of the tax, which may be lifted by its payment, and appellant is denied no constitutional right when that penalty, in a proceeding like this, is visited upon it for failing to make the payment.

128 Certainly appellant is not in a position to raise the last objection. It will be observed that failure to pay the tax is made a ground of defense to actions or suits brought or maintained by or on behalf of the defaulting corporation. This action is not brought or maintained by, or on behalf of, appellant, and no private litigant is interposing the defense. On the contrary, the proceeding is a direct one in the name, and by the authority, of the people of the state through its attorney general, and the corporation is brought in as a respondent and given full opportunity to be heard. It has been ruled that this is the proper practice. *Lumber Co. v. Ward,* 30 W. Va. 43. It is difficult to see how appellant may, in this proceeding, raise any such constitutional objection, for we repeat that not only has its right to be heard not been denied, but such right is expressly recognized by summoning it into court to speak. *McMillan v. Anderson,* 95 U. S. 40. If this were a case brought by, or maintained in behalf of, appellant against some defendant who sought to interpose the defense which the section authorizes, or if appellant were denied the right to defend in court, the case would be entirely different, and we might then be called upon to pass upon the point. That this remedy impairs the obligation of a charter contract, is based upon the proposition that no tax can be levied upon appellant's privilege to do business in this state, and this point receives consideration in connection with the next, and most important, general objection.

5. This is that section 65 violates section 11 of article 2 of the state constitution, and paragraph 1 of section 10 of article I of the federal constitution, in that it is an *ex post facto* law, retrospective in its operation, and impairs the obligation of a contract between

129 appellant and the state, and conflicts with other provisions of the state and federal constitutions. The argument is that, by the payment of the fee exacted by the state at the time the certified copy of articles of incorporation was filed, appellant thereby acquired, free from the burden of any additional tax or license fee of any kind whatsoever, the absolute right during the entire term of its corporate existence to do business as a corporation and to enjoy within the limits of this state all its rights and privileges and franchises granted to it by the state; that if this license tax is, as the state claims, an occupation or business tax, then its imposition is in violation of the terms of the contract included in its charter.

For several reason we are unable to agree with appellant. The fee paid to the secretary of state for the use of the state when the certificate is filed is not, in any sense, a tax. It is the conventional price or bonus, which the corporation pays to the state for the privilege of entering this state to do business as a corporation, subject to all legitimate taxation which the state may impose upon the property that it may acquire in the exercise of its franchise rights, and upon the use of the privileges thus purchased. The right or privilege *to be* a corporation is a franchise itself, often called a primary franchise, and while it was not this franchise which appellant obtained by the payment of the filing fee, because that had already been granted by the state of New Jersey, yet it was for the right to come into this state, and do business, as a corporation that the bonus was exacted. The secondary franchise or right of making use of the purchased privilege, which the books denominate the fran-
130 chise *to do*, is entirely distinct and separate from the franchise *to be*, or to exist here as a corporation. These distinctions are recognized by the highest authorities. In Central Pacific R. R. *v.* California, 162 U. S. 91, 127, the court says: "The right and privilege, or franchise, of being a corporation, is of value to its members and is considered as property separate and distinct from the property which the corporation may acquire." And we add, distinct from the franchise or privilege it secures to carry on the business which it was organized to transact. In *Lumberville &c. Bridge Co. v. State Board Assessors, supra,* the same doctrine is announced.

Moreover, unless the filing fee is a tax, and is to be considered as a substitute for, or the equivalent, or in lieu of, the entire tax which the general assembly intended to exact of foreign corporations for the privilege of doing business in this state, they cannot escape the license tax imposed by section 65, even though the filing fee statute expressly granted the exemption; for by section 9 of article 10 of our constitution the power to tax corporations and corporate property can never be relinquished or suspended.

But, as already observed, the particular claim here is that the filing fee, paid when appellant's certificate was filed with the secretary of state, was the payment of a tax in a lump sum for the privilege of exercising its corporate franchises and transacting its business in this state for the full term of its corporate existence, free from all further taxation; in other words, a business tax for the entire period. We have already held that this filing fee was the conventional price for appellant's right of entrance, as a corporation, and when paid merely entitles it to come into this state to do business as a
131 corporation, and gives it a standing similar to that which is secured by a domestic corporation which files its original certificate of incorporation with the secretary of state and pays the prescribed fee therefor. Neither the domestic nor the foreign corporation is thereby relieved of any subsequent legitimate tax for carrying on its business as a corporation.

But suppose it was such a tax as appellant says it is. Aside from the constitutional reason just given, it cannot, for another reason, be given the scope claimed for it. There is nothing in the language

of the filing statute which expressly, or by implication, exempts corporations from subsequent, or additional, taxation either upon their property or upon their right to transact business; and the universal rule in such cases is that exemptions are not favored, but must be clearly established or found in the contract or enactment under which they are claimed, either by express words, or by implication so strong as to lead irresistibly to the conclusion that exemption was intended. 10 Cyc. Law and Pro. 200 and notes. There is nothing in our act expressly conferring the exemption.

The appellant, conceding that to be so, insists that it is implied, for, it says, when the state granted the privilege of doing business in this state for a specified price, and did not expressly reserve the right to increase it, to add to the agreed consideration is beyond its power. In support of this contention the main reliance is upon *Gordon et al. v. Appeal Tax Court*, 3 How. 133, and other cases which have followed and approved it. That case has been so often criticised and disapproved by the Supreme Court of the
132 United States itself that it can no longer be considered as authority for the particular contention which appellant here makes. Two subsequent cases in the Supreme Court of the United States uphold the validity of a tax imposed by the statute there attacked, which is practically the same as that we are now considering. In *Memphis Gas Light Co. v. Shelby County*, 109 U. S. 398, a claim of exemption was made. The provision of the charter of the gas company on which its counsel mainly relied as showing a contract exempting it from taxation, gave to the company the privilege of erecting, establishing and constructing gas works, and manufacturing and vending gas in the city of Nashville for the term of fifty years, at prices therein prescribed. The particular point urged was that the subsequent statute of the state which assessed a license tax of $250 a year against the gas company was void because it violated the contract found in its charter, and the point pressed there, as here, was that to permit the state to tax the gas company by a license tax for the privilege granted by its charter is to destroy that privilege; but the court, speaking by Mr. Justice Miller, thus disposed of that argument:

"But the answer is that the company took their charter subject to the same right of taxation in the state that applies to all other privileges and to all other property. If they wished or intended to have an exemption of any kind from taxation, or felt that it was necessary to the profitable working of their business, they should have required a provision to that effect in their charter."

And quoting from *Erie R. R. Co. v. Penna.*, 21 Wall. 492, the court declared: "The language in which the surrender (of the right of taxation) is made must be clear and unmistakable." In
133 our statute, as in the Memphis Gas Company case, there is no express language which attempts to exempt appellant from taxation, nor is there even the remotest implication of such exemption. In *New Orleans City etc Co. v. New Orleans*, 143 U. S. 192, the same doctrine was announced, and *Gordon v. Appeal Tax Court*,

supra, commented upon and explained. See, also, *Erie Ry. Co. v. Commonwealth,* 66 Pa. St. 84.

In U. P. Ry. Co. *v.* De Busk, 12 Colo. 294, 307, our own court, in referring to the claim there made that a state statute impaired the obligation of the contract which was included in a corporate charter, quotes approvingly the well considered case of *Rodemacher v. Ry. Co.,* 41 Ia. 297, in which it was declared that: "There is no implied contract between a state and a corporation that there shall be no change in the laws existing at the time of the incorporation which shall render the use of a franchise more burdensome or less lucrative." The corporation takes "its charter subject to the general laws, and of course subject to such changes as shall be rightfully made in such laws." This applies to tax laws, as well as to others. That the right of exemption must be clearly shown, in cases like the one in hand, has often been decided.

Wells *v.* Savannah, 181 U. S. 531;
Delaware Railway Tax, 18 Wall. 206;
2 Cook on Corporations (5th ed.) §572b;
Atty. General *v.* Bay State Mg. Co. 99 Mass. 148, 152;
4 Thompson on Corporations, §§ 5571, 5572;
Judson on Taxation, §41;
Adams Express Co. *v.* Ohio State Auditor, 166 U. S. 185;
Lumber Co. *v.* Ward, 30 W. Va. 43, 48;
Standard &c. Cable Co. *v.* Atty. General, 46 N. J. E. 270.

134 Our conclusion is that the payment of the filing fee was not intended as a tax in a lump sum for the privilege granted to a corporation of exercising its charter powers, but merely the purchase price or bonus for the privilege of existing here as a corporation. But if it should be considered as a tax for the privilege of doing business in the state, this would not, in the absence of a clear exemption from further or additional burden,—which was not granted it—prevent the legislature from imposing an additional tax upon its business. No provision of the state or federal constitution would be violated by such subsequent levy of an occupation tax.

In *Kiowa County v. Dunn,* 21 Colo. 185, it was said that the property or business of a non-resident cannot be taxed in a different manner, or at a different rate, than that of a resident. A business or occupation tax was not involved in that case. But it is clear that in a license or business tax upon corporations the state may discriminate against a foreign, and in favor of a domestic, corporation, though it may not between a resident, and non-resident, natural person. This is declared in the leading case of *Paul v. Virginia,* 8 Wall. 168, 181, and the cases following that authority. In Pembina Mg. Co. *v.* Penna. 125 U. S. 181, 188, the Supreme Court of the United States, in considering the claim that in imposing license or franchise taxes the foreign corporations must be treated the same as domestic ones, said: "The power of the state to discriminate between her own domestic corporations and those of other states, desirous of transacting business within her jurisdiction, was clearly established," sub-

ject only to such limitations as may be found in the fundamental law of the Union.

Copper Co. *v.* Scherr, 50 W. Va. 533;
13 Am. & Eng. Enc. Law (2d ed.), 844 *et seq.* 860.

135 Nor is the objection that foreign corporations, the par value of whose shares of stock is less than one dollar per share, are required to pay less tax than those whose shares of stock are of a greater value, good; for it is within the power of the general assembly, in imposing taxes of this kind, to make reasonable classifications for the purposes of taxation. In what particular, if at all, the classifications of this section are unreasonable, we are not advised.

6. Appellant is engaged in the business of mining, smelting, and refining ores and marketing the refined product, and the ores which it smelts in Colorado it obtains not only in this state but from other states of the Union, and from British Columbia and the Republic of Mexico, and of the aggregate business which it transacts, about twenty per cent. is done, and about twenty per cent. of its aggregate capital is employed, and a like amount of its property is situate, within this state. The bullion from the ores which it brings into, and from the ores which it both mines and treats in, this state, are sent to another state for refining, and from the refinery sent elsewhere to be sold or coined into money. For these reasons appellant contends that it is engaged in foreign and inter-state commerce, hence the tax here levied is laid upon that commerce, and, therefore, cannot be sustained.

We do not perceive the force of the argument. The tax is not levied upon any article that is imported into, or exported from, this state, nor is any instrument of inter-state or foreign commerce taxed, nor is any burden placed upon that commerce in the sense in which that term is used in the federal constitution. If there is any burden at all, it is only incidental, and such as results from all legitimate taxation.

136 Waters Pierce Oil Co. *v.* Texas, 177 U. S. 28;
Judson on Taxation, §158;
Ashby *v.* Ryan, 153 U. S. 436;
Postal Tel. Co. *v.* Charlestown, 135 U. S. 692.

The fact that only a portion of its capital is employed, and only a relatively small part of its property situate, in Colorado, does not relieve it from the payment of a tax of this nature. This has been expressly ruled in *Horn Silver Mg. Co. v. New York,* 143 U. S. 305. The particular objection that it is unfair and unjust and oppressive to the corporation not to take into consideration the fact that the larger portion of its capital and its property are situate without this state, was referred to in that case, and it was there said that such an argument should be addressed to the legislature, but it was not a matter with which the courts could interfere.

7. The late case of *People of the State of N. Y. ex Rel. The Met. Street Ry. Co., v. State Board of Tax Commrs.,* decided by the Supreme Court of the United States after oral argument of the case at

bar, and not yet officially reported, answers all the substantial objections which the appellant has made against the validity of this tax. The court there held that the principal objection to the tax made in that case, which was the same as that here, viz., that when the state grants a privilege on condition of the payment of a lump, or of an annual, sum the contract implies that the public shall exact no larger amount for that privilege, and that thereafter to impose a tax upon it is simply increasing the price which the grantee is called upon to pay for the privilege,—finds no justification in principle or authority.

See, also, the same case reported in 174 N. Y. 417, 446.

137 We are satisfied that this corporation license tax is on the business of foreign corporations which are established, and doing business, in this state, and, as such, is not subject to any of the constitutional objections interposed by appellant. The judgment below which sustained tax should, therefore, be affirmed, and it is so ordered.

Affirmed.

Decision by the court *en banc*.

138 And afterwards and on to-wit, July 12, A. D. 1905, there was filed in our said Court, a petition for a rehearing, which is in words and figures as follows, to-wit:

Petition for a Rehearing.

Comes now the said appellant, by Wolcott, Vaile & Waterman, its attorneys, and respectfully prays the Court that a rehearing be granted in this cause, and that upon such rehearing the present opinion herein, affirming the judgment of the court below, be withdrawn, a reargument of the cause allowed, and a decision rendered reversing said judgment and decree.

139 And further and on to-wit, October 2, A. D. 1905, the following proceedings were had and entered of record, to-wit:

No. 4798.

AMERICAN SMELTING AND REFINING COMPANY, Appellant,

v.

THE PEOPLE *ex Rel.* H. A. LINDSLEY, District Attorney, etc., Appellee.

Appeal from the District Court of the City and County of Denver.

This cause now coming on to be heard upon the petition of appellant for a rehearing herein and upon consideration thereof and the Court being now fully advised in the premises; It is Ordered and Adjudged by the Court that the said petition be and the same is hereby denied.

140 And afterwards, and on October 10, 1905, there was filed in our said court the following original Petition for a Writ of Error, Assignments of Error, Writ of Error, and Citation with the Proof of Service thereof, as also Supersedeas Bond, all of which are in words and figures as follows, to-wit:

141 In the Supreme Court of the State of Colorado.

AMERICAN SMELTING AND REFINING COMPANY, Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF COLORADO, on the Relation of HENRY A. LINDSLEY, District Attorney for the Second Judicial District of the State of Colorado, Defendant in Error.

Now comes American Smelting and Refining Company, a Corporation organized and existing under and by virtue of the laws of the State of New Jersey, Plaintiff in Error, and prays that a Writ of Error in the above entitled cause may issue to said the Supreme Court of the State of Colorado, to review that certain final judgment entered in the said Supreme Court of the State of Colorado on the 3rd day of July, A. D. 1905, in favor of the said The People of the State of Colorado On the Relation of Henry A. Lindsley, District Attorney for the Second Judicial District of the State of Colorado, Defendant in Error, and against the said American Smelting and Refining Company, Plaintiff in Error, affirming that certain judgment entered in the District Court sitting within and for the City and County of Denver, in the State of Colorado, in favor of said Defendant in Error, for the reason that manifest error hath intervened in the rendition of said judgment in the said Supreme Court of the State of Colorado, to the great damage and injury of the said American Smelting and Refining Company, Plaintiff in Error. That the said errors of the said Supreme Court of the State of Colorado herein complained of are particularly assigned and set forth in
142 the Assignment of Errors herewith tendered and filed.

Wherefore, The said American Smelting and Refining Company, Plaintiff in Error aforesaid, prays for the allowance of a Writ of Error to operate as a Supersedeas, and such other process as may cause the said judgment rendered as aforesaid by the said The Supreme Court of the State of Colorado to be reviewed and corrected by the Honorable The Supreme Court of the United States.

AMERICAN SMELTING AND REFINING COMPANY,
By JOEL F. VAILE,
CHARLES W. WATERMAN,
Its Attorneys.

THOMAS THACHER,
Of Counsel.

(W:S:10:9:05:)

143 The Supreme Court of the State of Colorado.

AMERICAN SMELTING AND REFINING COMPANY, Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF COLORADO on the Relation of HENRY A. LINDSLEY, District Attorney for the Second Judicial District of the State of Colorado, Defendant in Error.

Assignments of Error.

Comes now the said plaintiff in error and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Colorado in the above entitled cause there is manifest error in this, to-wit:

1. The court erred in holding that the provisions of that certain Act of the General Assembly of the State of Colorado, entitled "An Act in relation to Public Revenue, and repealing all previous Acts or parts of Acts in conflict therewith," and especially Sec. 64, Sec. 65 and Sec. 66 of said Act approved March 22, 1902, are not in conflict with and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, in that the State of Colorado by and through the provisions of said Act and of the said Sections thereof assumes and seeks (1) to deprive the plaintiff in error and certain other citizens of the United States and of the State of Colorado, or some other one of these United States, of rights, privileges and immunities secured to other citizens of the United States and of said State of Colorado; (2) to deprive the plaintiff in error and other citizens of the United States similarly situated of liberty and property without due process of law; and (3) to deprive and deny to the plaintiff in error and certain other citizens and persons corporate within the jurisdiction of the State of Colorado, the equal protection of the laws.

144 2. The court erred in holding that by the provisions of said Act the plaintiff in error is not deprived of rights, privileges and immunities secured to other citizens of the United States and of the State of Colorado by the federal constitution and the laws of the United States.

3. The court erred in holding that the provisions of said Act are not in conflict with and in violation of the provisions of the Fifth Amendment to the Constitution of the United States, in that by the provisions of said Act, and especially by Sections 65 and 66 thereof, the State of Colorado assumes and seeks to deprive the plaintiff in error and other citizens of the United States of liberty and property without due process of law.

4. The court erred in holding that the provisions of said Act and of the Sections thereof, above specified, are not in violation of Section X of Article I of the Constitution of the United States, in that by and through said provisions of the Act aforesaid, the State of Colorado assumes and seeks to impair the obligation of the contract between the plaintiff in error and the State of Colorado, and to

5. The court erred in holding that by the said provisions of the Act aforesaid, the plaintiff in error was not deprived of liberty or property without due process of law.

6. The court erred in holding that the said provisions of the Act aforesaid do not deny to the plaintiff in error the equal protection of the laws.

7. The court erred in holding that the said provisions of the Act aforesaid do not impair the obligation of contracts nor deprive the plaintiff of pre-existing contractual rights.

8. The court erred in holding that the said provisions of the Act aforesaid do not unlawfully discriminate between foreign corporations and domestic corporations doing business in the State of Colorado.

145 9. The court erred in holding that the said provisions of the Act aforesaid do not unlawfully discriminate between foreign corporations and domestic corporations having a capital stock of less than $25,000.00.

10. The court erred in holding that the said provisions of the Act aforesaid do not unlawfully discriminate between foreign corporations, the par value of whose stock is $1.00 or more per share, and those, the par value of whose stock is less than $1.00 per share.

11. The court below erred in holding that the said provisions of said Act do not grant special and exclusive privileges to individuals and non-incorporated associations which it denies to the plaintiff in error and other corporate citizens and persons engaged in the same business, and owning or using the same class of property.

12. The court erred in holding that the provisions of said Act are uniform in their operation throughout the State upon all citizens of the State, or persons lawfully doing business therein similarly situated.

13. The court erred in holding that the provisions of said Act are not in violation of Section VIII of Article I of the Constitution of the United States, conferring upon Congress exclusive power to regulate commerce among the several States.

14. The court erred in approving the findings of the District Court within and for the City and County of Denver, State of Colorado against the plaintiff in error, and in affirming the decree of the said District Court, declaring that plaintiff in error had forfeited its franchises and forbidding it longer to do business within the State of Colorado.

15. The court erred in holding that the tax purporting to be imposed by the said provisions of the Act aforesaid was not a property tax.

146 16. The court erred in holding that said imposition was not a tax upon the capital stock of plaintiff in error, nor upon said capital stock as property.

17. The court erred in holding that the tax authorized by Section 65 of said Act is a mere license or excise tax.

18. The court erred in holding that said imposition is a tax on the business of foreign corporations.

19. The court erred in holding that the tax sought to be imposed

by the said provisions of the Act aforesaid is not an *ad valorem* tax on property, but is a privilege or occupation tax and therefore not violative of the laws requiring uniformity of taxation.

20. The court erred in holding that said Act denies no constitutional right of the plaintiff in error, because the plaintiff in error might escape the penalty imposed by said Act by submitting to such tax without questioning its validity.

21. The court erred in holding that the plaintiff in error is not in a position to raise the objection that said provisions of the Act aforesaid deprive plaintiff in error of its constitutional right to due process of law and the equal protection of the laws.

22. The court erred in holding that plaintiff in error is herein seeking any exemption from legitimate taxation, or that the said provisions of the Act aforesaid are a legitimate exercise of the power of taxation.

23. The court erred in holding that the plaintiff in error is herein or at all claiming that its payment of the tax imposed in a lump sum for the privilege of exercising its corporate franchises and transacting business in the State of Colorado for the full term of its existence entitled it to freedom from all further taxation.

24. The court erred in holding that the original tax paid by the plaintiff in error for the right to do business in the State of Colorado did not authorize the plaintiff in error to carry on its business in said State.

147 25. The court erred in holding that the Supreme Court of the United States has ever upheld the validity of a tax imposed by a statute or statutes practically or at all the same as that involved in this case.

26. The court erred in holding that the revenue imposition provided for in said provisions of the Act aforesaid is an occupation tax, and therefore not violative of any provision of the state or of the federal constitution.

27. The court erred in holding that the State of Colorado in the matter of taxation, such as that sought to be imposed by said provisions of the Act aforesaid, is entitled to discriminate between domestic and foreign corporations.

28. The court erred in holding that the State of Colorado in the matter of taxation aforesaid has the right to discriminate between foreign corporations, the par value of whose stock is less than $1.00 per share, and those, the par value of whose stock is $1.00 or more per share.

29. The court erred in holding that the State of Colorado is entitled to impose a tax, such as is sought to be imposed by the Act aforesaid, upon the entire capital stock of the plaintiff in error, notwithstanding the fact that not more than twenty per cent. of its aggregate capital is employed in the State of Colorado, or more than a like amount of its property situated therein.

30. The court erred in holding that the tax upon the entire capital stock of the plaintiff in error is lawful and legitimate because incidental to the employment of the twenty per cent. of said capital

stock and a like amount of the property and business of plaintiff in error within the State.

31. The court erred in holding that the fact that only a small part, relatively, of the property and business of plaintiff in error is situated in Colorado, does not relieve it from the payment of a tax of this nature upon the whole amount of its capital stock.

148 32. The court erred in holding that when the State grants a privilege, on condition of the payment of a lump or of an annual sum, the contract does not imply that the public shall not thereafter exact a larger amount for that privilege, but is authorized thereafter to impose a tax upon it which is simply increasing the price which the plaintiff in error is called upon to pay for the right to do business in the State of Colorado.

33. The court erred in holding that the imposition provided for in said Act and the sections thereof aforesaid, is a license tax on the business of foreign corporations.

34. The court erred in approving and confirming the finding and judgment of the District Court within and for the City and County of Denver, State of Colorado, that there is now due from the plaintiff in error and payable to the Auditor of the State of Colorado an annual State corporation license tax of $4,000.00, or any other sum, on or before the 1st day of May, 1902, or any other time, and that the same is still due.

35. The court erred in approving and confirming the finding of the said District Court, that the plaintiff in error still continues to exercise the powers, privileges and franchises of a corporation within the limits of the State of Colorado without warrant of law.

36. The court erred in affirming the decree of the said District Court, adjudging and decreeing that the plaintiff in error has forfeited its right to do business within the State of Colorado until such tax is paid.

37. The court erred in affirming the decree of the said District Court adjudging that the plaintiff in error be and is absolutely and wholly deprived of all rights and privileges within the State of Colorado until such tax is paid.

38. The court erred in holding and adjudging that the said provisions of the Act aforesaid are constitutional and valid.

149 39. The court erred in failing and refusing to reverse the decree of the said District Court herein.

JOEL F. VAILE,
CHARLES W. WATERMAN,
Solicitors for the said Plaintiff in Error.

THOMAS THACHER, *Of Counsel.*

150 [Endorsed:] 4798 Supreme Court, State of Colorado. American Smelting and Refining Company, *vs.* The People of the State of Colorado on the Relation of Henry A. Lindsley, district attorney for the second judicial district of the State of Colorado. Petition for writ of error and assignments of error. Filed

151 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, To The Honorable the Supreme Court of the State of Colorado; Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of plea, which is in the said The Supreme Court of the State of Colorado, before you, or some of you, being the highest court of law or equity of the said State of Colorado in which a decision could be had in a suit between The People of the State of Colorado On the Relation of Henry A. Lindsley, District Attorney for the Second Judicial District of the State of Colorado, Plaintiff, and American Smelting and Refining Company, Defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State of Colorado, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission; a manifest error hath happened, to the great damage of the said American Smelting and Refining Company, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your Seal, distinctly and openly you send
152 the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the same in the said Supreme Court at Washington within Thirty (30) days from the date hereof; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, The Honorable Melville W. Fuller, Chief Justice of the United States, the tenth day of October, in the year of our Lord one thousand nine hundred and five.

[Seal United States Circuit Court, District of Colorado.]

CHARLES W. BISHOP,
Clerk of the Circuit Court of the United States within and for the District of Colorado.

The above writ is hereby allowed, October tenth 1905.

WILLIAM H. GABBERT,
Chief Justice and Presiding Justice of the

Return.

UNITED STATES OF AMERICA, *State of Colorado, ss:*

In obedience to the command of the within Writ, I herewith transmit to the Honorable The Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled cause, and with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of the Supreme Court of the State of Colorado, at the City and County of Denver, in said State, this 21st day of October, A. D. 1905.

[Seal Supreme Court, State of Colorado.]

HORACE G. CLARK,
Clerk of the Supreme Court of the State of Colorado.
By JAMES PERCHARD, *Deputy.*

153 [Endorsed:] Supreme Court, State of Colorado. American Smelting and Refining Company, *vs.* The People of the State of Colorado, On the Relation of Henry A. Lindsley, District Attorney for the Second Judicial District of the State of Colorado. Writ of Error. Filed in Supreme Court, Oct. 10 1905 at 3 o'clock p. m. Horace G. Clark, Clerk.

154 UNITED STATES OF AMERICA, *ss:*

To the People of the State of Colorado on the Relation of Henry A. Lindsley, District Attorney for the Second Judicial District of the State of Colorado; Greeting:

You are hereby cited and admonished To be and appear at a Supreme Court of the United States, at the City of Washington, in the District of Columbia, within Thirty (30) days from the date hereof, pursuant to a Writ of Error filed in the Clerk's office of the Supreme Court of the State of Colorado, wherein American Smelting and Refining Company, a Corporation, is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error, as in said Writ of Error mentioned, should not be corrected, and speedy justice should not be done in that behalf.

Witness, The Honorable William H. Gabbert, Chief Justice of the Supreme Court of the State of Colorado, this tenth day of October, in the year of our Lord one thousand nine hundred and five.

WILLIAM H. GABBERT,
Chief Justice of the Supreme Court of the State of Colorado.

Personal service of the above and foregoing Citation, by receipt of a full, true and correct copy thereof, is hereby admitted at Denver, State of Colorado, this 16th day of October, A. D. 1905.

N. C. MILLER,
Attorney for the Defendant in Error.
N. C. MILLER,
Attorney General of the State of Colorado.

(W.8:10:9:05)

155 [Endorsed:] # 4798 American Smelting & R. Co appellants v The People &c & appellees Filed in Supreme Court October 17th 1905 Horace G. Clark Clerk By James Perchard Deputy

156 Know all men by these presents, That we, American Smelting and Refining Company, a corporation, as principal, and American Securety Co. of N. Y., as sureties, are held and firmly bound unto The People of the State of Colorado on the relation of Henry A. Lindsley, District Attorney for the Second Judicial District of the State of Colorado in the full and just sum of Six Thousand ($6000.00) dollars, to be paid to the said The People of the State of Colorado their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this tenth day of October, in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a term of the Supreme Court of the State of Colorado in a suit depending in said Court, betewen American Smelting and Refining —, Appellant and The People of the State of Colorado on the relation of Henry A. Lindsley, District Attorney for the Second Judicial District of the State of Colorado a certain final judgment was rendered against the said American Smelting and Refining Company and the said American Smelting and Refining Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The People of the State of Colorado on the relation of Henry A. Lindsley District Attorney as aforesaid citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within 36 days from the date thereof.

157 *Now, the condition of the above obligation is such,* That if the said American Smelting and Refining Company shall prosecute said Writ of Error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[SEAL.] AMERICAN SMELTING & REFINING COMPANY,
By FRANKLIN GUITERMAN, [SEAL.]
Its General Manager for Colorado Department.

Sealed and delivered in presence of
M. ALICE PRIOR.
MABLE NANCARROW.

AMERICAN SURETY COMPANY OF NEW YORK.
By NEWCOMB CLEVELAND,
Resident Vice-President.

Attest:
EDMON G. BENNETT,
Resident Assistant Secretary.

Approved by:
WILLIAM H. GABBERT,
Chief Justice of the Supreme Court of the State of Colorado.

October tenth, 1905.

158 *Extract from the Record Book of the Executive Committee of the American Surety Company of New York.*

"A meeting of the Executive Committee of the American Surety Company of New York was held on the 26th day of April, 1905.

* * * * * * *

"The following resolution was adopted:

"Resolved, That Newcomb Cleveland, of Denver, Colorado, be and he is hereby constituted and appointed a Resident Vice President of this Company at Denver, aforesaid, with full power and authority to execute and deliver any and all surety bonds and undertakings, for or on behalf of this Company in its business and in accordance with its charter; such bonds and undertakings to have in every instance, however, the seal of this Company affixed thereto and to be attested by the signature of a Resident Assistant Secretary of this Company at Denver, aforesaid vice Harry Schiffer, resigned."

STATE OF NEW YORK, *County of New York, ss:*

I, R. R. Brown, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Executive Committee of the American Surety Company of New York, with the original record of said Executive Committee, and
159 that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolution with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution; and that the said resolution has not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 18th day of August, 1905.

[SEAL.] R. R. BROWN.

160 *Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.*

"The regular quarterly meeting of the Board of Trustees of the American Surety Company of New York was held at the Company's office, No. 100 Broadway, in the City of New York, on Wednesday, January 18, 1905, at 12 o'clock noon.

* * * * * * *

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees of the American Surety Company of New York.

"GENTLEMEN: The Committee appointed by the Executive Committee of this Company at their meeting held Wednesday, December 21, 1904, for the purpose of nominating officers of the Company, * * * for the ensuing year, beg leave to report as follows:

"We nominate for * * *

Resident Vice Presidents at Denver, Colorado:
Jos. A. Thatcher,
Frank Evans.
Resident Assistant Secretaries at Denver, Colorado:
W. Scott Bicksler,
Edmon G. Bennett.

* * * * * * *

161 "Whereupon, it was

"Resolved, that the Secretary be authorized to cast one ballot on behalf of the Trustees present for the officers, members of the Executive Committee, and for the members of the Committee on Accounts, as recommended by the Nominating Committee for the ensuing year; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year.

* * * * * * *

"The following resolution was adopted:

"Resolved, that the resident Vice-Presidents be and they hereby are, and each of them is hereby authorized and empowered to execute and deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by the Resident Assistant Secretary."

* * * * * * *

STATE OF NEW YORK, *County of New York, ss:*

I, F. J. Parry, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York,

with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further
162 certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at
[SEAL.] the City of New York, this 26th day of Sept., 1905.

F. J. PARRY,
Assistant Secretary.

(Endorsed:) Filed in Supreme Court, Oct. 10 1905 at 3 o'clock P. M. Horace G. Clark Clerk.

163 In the Supreme Court of the State of Colorado.

AMERICAN SMELTING AND REFINING COMPANY, Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF COLORADO on the Relation of HENRY A. LINDSLEY, District Attorney for the Second Judicial District of the State of Colorado, Defendant in Error.

Certificate of the Clerk of the Supreme Court of the State of Colorado.

I, Horace G. Clark, Clerk of the Supreme Court of the State of Colorado, do hereby certify That the above and foregoing is a full, true, complete and correct transcript of the record in the above entitled cause, as the same now remains on file in my office; that, as required by law and the Writ of Error from the Supreme Court of the United States herein filed, I herewith transmit the same to the Supreme Court of the United States, together with the original Petition for Writ of Error, the original Writ of Error and original Assignments of Error and the original Citation with the proof of service thereof.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the said The Supreme Court of the State of Colorado, at Denver, Colorado, this 21st day of October, A. D. 1905.

[Seal Supreme Court State of Colorado.]

HORACE G. CLARK, *Clerk*,
By JAMES PERCHARD, *Deputy*.

Endorsed on cover: File No. 19,951. Colorado Supreme Court. Term No. 449. American Smelting and Refining Company, Plaintiff in Error, *vs.* The People of the State of Colorado on the relation of Henry A. Lindsley, district attorney for the second judicial district of the State of Colorado. Filed November 3d, 1905. File No. 19,951.